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An Essay in the Deconstruction of Contract Doctrine

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[A]pparently the realization of deepgoing antinomies in the structure of our system of contracts is too painful an experience to be permitted to rise to the full level of our consciousness.

—Friedrich Kessler*

INTRODUCTION

Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority.¹ In this, law is no different from the *Boston Globe*, the CBS evening news, *Mother Jones*, or a law school faculty meeting. When we tell one another stories, we use languages and themes that different pieces of the culture make available to us, and that limit the stories we can tell. Since our stories influence how we imagine, as well as how we describe, our relationships, our stories also limit who we can be.

In this Article, by examining the rules of contract law as applied by judges and elaborated by commentators, I ask whether we can begin to understand the particular limits law stories impose on the twin projects of self-definition and self-understanding.² Can we, in other words, expose the way law shapes all stories into particular patterns of telling, favors certain stories and disfavors others, or even makes it impossible to tell certain kinds of stories?³

The stories told by contract doctrine⁴ are preoccupied with what must be central issues in any human endeavor of our time and place. One set of questions concerns power: What separates me from others and connects

*Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943).

1. For a recent compelling account of the lawyer as storyteller, see Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

2. For some incisive observations about the peculiar nature of *legal* stories, see Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 705, 720–24 (1931).

3. If we lawyers create this world of story, then we may legitimately ask how we could ever transcend our own limitations to see the limitations of our creation. The answer must be that the stories we tell only partly constrain us. Lawyers and would-be lawyers can and do learn to set off their “professional” stories from their “personal” stories; in this sense, at least, some competing viewpoints are available to all of us. A fruitful comparison is provided by the work of Carol Gilligan, who writes of the two different voices that members of our society tend to use to formulate and resolve moral dilemmas. Both voices are generally available to each individual, but individuals differ dramatically in the extent to which they use each voice, and different types of situation may provoke the use of one voice rather than the other. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

In addition, those who dominate the legal forum only incompletely dictate the range of legitimate stories. There is therefore some room for those who speak in a different voice, and who can use that voice to critique the dominant one.

4. I am using the word “doctrine” here in an expansive sense. I mean by it not just the bare-bones articulation of rules, as in “silence cannot generally constitute assent,” or the text of a *Restatement* provision, but instead the rules as applied by judges and elaborated by commentators. A judicial opinion is therefore an instance of “doctrine,” as are the commentary and illustrations that accompany each *Restatement* provision.

me to them? What is the threat and the promise to me of other individuals? Can I enjoy the promise without succumbing to the threat? Am I able to create protective barriers that will not at the same time prevent me from sharing the pleasures of community? What is the role of the state in regulating my relations with others? The other set of questions concerns knowledge: How can I know what others see, what they intend? On what basis can I share my understanding of the world with others? Is there a reality separate from my grasp of it? Is communication possible? These central questions of power and knowledge devolve from the split between self and other, subject and object, which structures our experience of the world. This Article examines precisely how this split structures our contract doctrine; how doctrine devotes its energies to describing, policing, and disguising the divide.

A. *The Project Described*

In this Article, I give an account of selected portions of contract doctrine and the themes and problems that permeate them. I demonstrate how our preoccupation with questions of power and knowledge is mirrored in doctrinal structures that depend on the dualities of public and private, objective and subjective, form and substance.⁵ I suggest that it is these problems of power and knowledge, these doctrinal structures, which contribute to the inconsistency and substantial indeterminacy of contract doctrine.

In elaborating doctrinal dichotomies, I suggest that contract doctrine consistently favors one pole of each duality: Contract law describes itself as more private than public, interpretation as more about objective than subjective understanding, consideration as more about form than about substance. And I suggest further that while the method of hierarchy in

5. I have chosen these dualities because they are a familiar part of the discourse of contract doctrine. Since the nineteenth century, contract doctrine has conceived of itself as being about intention and not regulation, and therefore as private and not public. The *Second Restatement* has expressed its preference for objective rather than subjective standards of interpretation by subordinating intent to manifestation. A longstanding debate over the nature of consideration asks whether the requirement is one of form or of substance.

Precisely because these concepts are familiar and much used, I am relying on my readers sharing at least a rough sense of what the terms convey, and how they are employed. This frees me from the task of having to offer initial definitions. Instead, I can ask my readers to explore with me the range of meaning and use of these key concepts as my analysis develops. Indeed, the provision of tidy definitions would be fundamentally incompatible with my project, which demonstrates that each pole of a duality is best understood and defined in relation to its opposite, and in fact depends upon an (unavailable) prior understanding of its opposite.

The dualities are also connected to one another by the problems of power and knowledge, in a fashion which their conceptual differentiation falsifies. Within our current doctrinal framework, the shift from intent to manifestation, as I will show, is most easily viewed as a shift from private to public from the perspective of knowledge. The shift from substance to form is most easily viewed as a similar shift from private to public from the perspective of knowledge, but can be seen as a shift from public to private from the perspective of power. All this is the subject of my story.

duality allows our doctrinal rhetoric to avoid the underlying problems of power and knowledge, it is an avoidance that is also a confession: The problems are only displaced, not overcome. This displacement is both diachronic and synchronic: The problems are frequently presented as having been then and not now, and equally frequently presented as being there and not here. To answer the strategy of displacement, my account necessarily deals with historical moments in the development of doctrine, as well as with doctrine in its current state. My claim is that the problems are now as well as then, here as well as there.

I begin the Article with a discussion of the public-private distinction in contract law, as reflected in the law's treatment of the implied contract. The implied-in-law contract or quasi-contract is traditionally considered an exceptional supplement to the body of contract doctrine; its reliance on social norms to create a public obligation is traditionally viewed as a deviation from contract doctrine's focus on the facilitation of private intent. But I demonstrate that the same factors that lead judges to impose quasi-contractual obligations influence both the "finding" of obligations implied-in-fact and the interpretation of express contracts. In this sense all contracts are public. The courts' creation of categories of contract of varying degrees of privateness is therefore only a strategy of displacing and containing, not resolving, the public threat to the private world of contract.

I next discuss the public-private distinction in the context of the doctrines of duress and unconscionability. Like the doctrine of quasi-contract, these doctrines serve as self-consciously public supplements to a dominantly private contract doctrine, by policing the limits of acceptable bargain in the name of social norms of fairness. But the route to that end is a convoluted one. At one level the "public" is consistently "reprivatized," with the undoing of a defective deal presented as depending upon the absence of will or intent rather than on mere inequivalence of exchange. Yet as the previous look at implied contracts demonstrates, this privatization itself ineluctably partakes of the public, as objective measures of will or intent—most notably the equivalence of the exchange—become the necessary proxies for subjective states of mind.

In Part II, I discuss the objective-subjective dichotomy in the context of those areas of contract doctrine—contract formation, the parol evidence rule, and mistake—that directly address questions of communication between parties, and questions of interpretation. I focus on the way doctrine favors objective interpretations of contracts over subjective ones by using devices that deflect attention from the threat objectivity poses to the claim that contract law is more private than public. These devices disguise the

law's inability to maintain an objective sphere uncontaminated by subjectivity.

In Part III, I explore the form-substance dichotomy as it operates in the doctrines dealing with consideration and with the alternative basis for liability we have come to call "reliance." The traditional debate is whether consideration is a doctrine of form or of substance. I suggest that the question is misplaced, for we are incapable of distinguishing correct from incorrect form without an answer to the question "Form of what?" And the latter question inevitably takes us from a concern with form to a concern with substance.

In the traditional debate, substance is understood to stand for the idea of "objective value." To the extent that consideration doctrine does depend on notions of objective value, it reflects the supplemental public rather than the dominant private view of contract. What the traditional debate largely has not recognized is that an alternative substance on which consideration doctrine frequently depends is the substance of the parties' intentions. To the extent that consideration depends on notions of subjective intent, it reflects the supplemental subjective rather than the dominant objective view of contract interpretation. The wickedly intricate play of consideration doctrine therefore contains both the public-private dilemma earlier located in the doctrines of implied contract, duress, and unconscionability, and the objective-subjective dilemma earlier located in the doctrines of contract formation and interpretation.

In these manifold guises, contract doctrine promises that the source of our deepest anxiety, the chasm between self and other, can be bridged. It talks as if we were able to define the terms of the polarities we substitute for the basic one of self and other, as if we knew what was private and what public, what subjective and what objective, what form and what substance, or at least as if we could determine how much of one we needed and how much of the other by referring to standards we could all accept. Contract doctrine talks as if our problems of power and of knowledge could be resolved in all but the "hard case," the acknowledged frontier of the determinacy of the legal system. The privileging mechanism and the device of displacement together play a large part in providing us this semblance of reassurance, even as the "hard case" reassures us by reminding us of the "easy cases" from which we would distinguish it.

But, as it turns out, even the terms of our polarities are empty; within the discourse of doctrine, the only way we can define form, for example, is by reference to substance, even as substance can be defined only by its compliance with form. The doctrinal scheme provides us with no way to fill these empty vessels. It is not possible to draw lines at ordained points on axes whose poles exist only in relation to one another. Each supposed

“solution” to one of these doctrinal conundra, each attempt at definition or line-drawing, winds up mired at the next level of analysis in the unresolved dichotomy it purported to leave behind.

In my conclusion, I put the analysis developed in the earlier portions of the Article to work in examining how courts have dealt with the problems of enforcing agreements of cohabitation between unmarried people. Here I suggest that the demonstration of indeterminacy, and the linkage between indeterminacy and the fundamental problems of knowledge and power, can clear the way for some new inquiries into how and why cases get decided as they do. I show how the doctrinal techniques described in this Article work together in this setting toward the supposed resolution of a particular set of doctrinal issues. I try to bring to life the underlying issues of power and knowledge that lie buried in the doctrine, by focusing on the images of women and of human relationship that the doctrine presupposes, or that appear to influence the judges. I ask that we reflect directly on the concrete aspects of social life that create the disputes and shape their resolution in an area where there is startling lack of consensus, rather than covertly translate those aspects into the presence or absence of consideration, the presence or absence of implied contract.

The piece ends, as it begins, with questions. Why do we allow our decisionmakers to conduct their search for answers to concrete human problems in this particular form? This returns us to the problems of knowledge and power. In the name of what understanding of the human condition do our judges exert authority over us in our interactions with others? In the name of what understanding of the human condition do we allow ourselves to be thus constrained in imagining the possibilities of relationship with others?

B. *Method*

To demonstrate my thesis that contract doctrine is organized around the problems of power and knowledge, and that certain areas of doctrine contain particular manifestations of these difficulties, I rely on very close analyses of comparatively few texts. In part because the thinking that has gone into this piece began and continues in the classroom, my selected texts are familiar classroom materials: an assortment of older, well-known cases and recent, less-well-known ones, some seminal articles, and the recently published *Restatement (Second) of Contracts*.⁶ My claim is that the

6. RESTATEMENT (SECOND) OF CONTRACTS (1979) [hereinafter cited as RESTATEMENT (SECOND)]. Unless otherwise indicated, references in the text to the *Restatement*, are to the *Restatement (Second) of Contracts*.

I present what should be understood to be a flattened, synchronic picture of the *Second Restatement's* current signification. This picture is the reality for most students of contract, who come to the

patterns of conflict I uncover in the texts I examine, and the mediating devices I identify, are characteristic.

I support this claim in various ways throughout the Article. First, I draw on cases from different historical periods to show that the central problems of any area of doctrine, and the elements through which the problems are sought to be resolved, remain the same over time, although particular approaches to the resolution of these problems may come and go. Similarly, I draw on some very recent cases to demonstrate that these core problems cannot be consigned to history, but continue to plague the application of contract doctrine in our own time.⁷

My major source of older cases is Kessler and Gilmore's *Contracts: Cases and Materials*.⁸ Its disdain for the general rule, its methodical collection of contradictory decisions, and its insistence on contextualization make it perhaps the most skeptical of the traditional teaching materials. I find it particularly useful because of the editors' respectful refusal to edit the heart out of the texts they include, and their preference for opinions in which judges pay close attention to doctrine and wrestle with its limitations. In addition, the editors' many scholarly notes provide a good foil against which to test the possibility of a post-Realist reconstruction of the world of doctrine.⁹

I have also chosen to supplement case material with the more general

subject with little or no appreciation for its history, or for the role of the Restatements in that history. To them the *Second Restatement* speaks with the authority of a single, not a divided, voice; and its provisions are taken to announce the best articulated wisdom we can muster on the various topics within its scope. This is indeed one of the claims the *Second Restatement* makes, and for students it is likely to be unmitigated by the sophisticated understanding of differing perspectives which allows teachers to excuse evidence of internal inconsistency. Perhaps most importantly, the "frozen" picture of the *Second Restatement* that I paint allows us all, teachers and students, to face more directly the question whether any group, unanimous or divided, *could* have produced the internally consistent document the *Second Restatement* turns out not to be.

7. I have found recent cases to be of particular use in the classroom. They give students the experience of using their own understanding of how their society works today as a basis for critiquing a judicial product. Otherwise students seem all too ready to assume that their lack of historical information prevents them from judging a result which, if it were contemporary, would instinctively appall them. A contemporary decision denying relief to a woman who lived with a man for twenty years, raised his children, helped set him up in business, and then was abandoned by him is harder for students to distance themselves from than, for example, the plight of Sister Antillo, related in *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

8. F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* (2d ed. 1970) (1st ed. 1953) [hereinafter cited as *KESSLER & GILMORE*].

9. Unfortunately the book has one severe limitation: It is now desperately out of date, the most recent edition having been published in 1970. At one level any such concern is trivial, given how many contract casebooks give pride of place to nineteenth-century cases, how much of doctrine is essentially the same now as then. But it does mean that the Uniform Sales Act receives undue prominence, while the *Uniform Commercial Code* and interpretive cases get short shrift; and the *Second Restatement* appears only as a ghost on the horizon, making marginal appearances through extant Tentative Drafts. I have resolved this problem, for my teaching purposes, by relying heavily on the *Second Restatement* as a separate source, and by adding recent cases in a number of places, to demonstrate current variations on doctrinal manipulation.

account provided by the *Restatement*. It is often suggested that the *Restatement* sits uneasily between description and prescription, offering both a general account of the state of doctrine as practiced in the courts, and a preferred vision of what that doctrine should be. For my purposes, either view of the enterprise of the *Restatement* is valuable. Viewed as description, the fact that, as I will show, the *Restatement* shares the patterns I have found to operate in the cases, confirms my thesis. Viewed as prescription, it serves as further evidence of our culture's inability to progress beyond the problems I suggest plague the cases. Some might argue, "Yes, but everyone knows that the *Restatement* is an internally conflicted committee product." To this my reply would be: "Isn't it interesting that those same internal conflicts exactly characterize the work of any individual judge." Still others might charge, "Doesn't your reliance on idiosyncratic judicial products undermine your conclusions?" To this I would answer: "Isn't it interesting that the flaws in the judicial product are exactly those present in the *Restatement*."

Where I have used particular articles to support my arguments, I have chosen them either because the article itself is recognized as a particularly valuable addition to the literature, or because the author, at least in his own time, was held in high regard. I draw on articles because they, too, confirm that the problems inherent in judicial opinions are not the result of judicial inability or inattention, but are instead faithful reflections of the same difficulties that inhere in academic treatments of the same issues. In addition, the article writer often is forced into more complex and more thorough efforts at mediation because of the broader scope of his inquiry. The judge can often write an opinion that appears more coherent because of what he is able to leave out.

It is always possible to cast doubt on an argument by suggesting that it has been insufficiently proven, or proven only by judicious selection of evidence. I would simply have readers ask themselves whether the analyses I suggest are ones that shed new light on the material to which they apply those analyses. That a reader is intrigued enough to attempt such further applications, and in trying finds his perceptions altered by the framework I have offered, would make the project, for me, a successful one.

C. *The Project Located*

My approach to contract doctrines owes much to traditions of scholarship outside of law, and shares much with other attempts to bring these traditions to bear on legal materials and issues. At one level I incorporate a critique of liberal political theory and legal liberalism that has provided

a consistently fruitful perspective on structures of legal argumentation.¹⁰ The liberal conception criticized is that individuals can remain free to experience positive interactions with one another without interference by the state, while relying on the state to protect them from negative interactions. Under this liberal conception, clear guidelines as to what are positive and what negative interactions, guidelines formulated as legal rules, prevent the state from overstepping its proper boundaries.¹¹

The critique seeks to demonstrate how the various guidelines proposed by liberal legalism lack the clarity on which the liberal order presents itself as depending.¹² The critique further reveals that this lack of clarity represents our inability to decide how we should conceive relationships between people, how we should understand and police the boundary between self and other.¹³ Liberalism's obsession with, and inability to resolve, the tension between self and other suggests that our stories about politics, policy, and law will be organized along dualities reflecting this basic tension.¹⁴

The critique of liberalism connects this central tension within legal

10. For the origins of this critique, see K. MARX, *On the Jewish Question*, in EARLY WRITINGS 1 (T. Botmore trans. 1963). Early legal work in this genre could be said to include the writings of Commons, Hale, Felix and Morris Cohen, and Kessler. Later exponents are those working under the loose umbrella of "critical legal studies," with the first significant contribution perhaps being Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

11. For a critical account of this liberal conception in a non-legal context, see C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 1-4, 263-77 (1962). For an account in the context of legal consciousness, see Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18, 23-26 (D. Kairys ed. 1982) [hereinafter cited as *THE POLITICS OF LAW*].

12. It is crucial to understand that the critique is not espousing consistency or clarity or determinacy as its values; rather it seeks to reveal how the liberal system fails to live up to its expectations of itself. The flaw is measured against internal, not external, standards. This method of attack is frequently countered by an assertion that any "adult" understanding of the system includes the recognition that there will be "hard cases," and that clarity and consistency and determinacy are not universally attainable. The response to this argument must be, as I hope this Article demonstrates, first, that the problems extend beyond the "hard case," and second, that a system that devotes so much rhetoric to disguising indeterminacy, rather than frankly acknowledging it, forfeits the claim to adulthood.

13. To take concrete examples from work that has explored this difficulty: To what extent do we imagine that people should have regard only for their own interests, and to what extent do we imagine that people should have regard for the interests of others? See Kennedy, *supra* note 10, at 1713-37. To what extent do we think that people should be free to act, even if the consequences are injurious to others, and to what extent should people instead be protected against the consequences of others' activity? See Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975, 980-84. Our difficulties with the boundary between self and other are reiterated in our inability definitively to know what is or is not in our interests, and to define what counts as injury.

14. In *Form and Substance*, Kennedy frames his discussion around individualism and altruism, rule and principle. See Kennedy, *supra* note 10, at 1685-87. Singer, in *The Legal Rights Debate*, centers his analysis on the distinction between self-regarding and other-regarding behavior. See Singer, *supra* note 13, at 980; Feinman, in *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 838-47 (1983), uses individualism and collectivism as his organizing categories.

thought to the possibility for systematic (although not necessarily conscious) oppression by the “haves” of the “have-nots” through the manipulation of inconsistent but equally legitimate strands of legal argument. This is not a crude determinism, but an explanation of how a legal order that proclaims itself to be based on democratic principles, individual rights, due process, and equal protection can still operate to exclude important constituencies from the benefits available within the society.¹⁵

If this critique of liberal legal argument has weight, as I believe it does, we need first to understand more concretely how doctrinal inconsistency necessarily undermines the force of any conventional legal argument, and how opposing arguments can be made with equal force. We need also to understand how legal argumentation disguises its own inherent indeterminacy and continues to appear a viable way of talking and persuading. We need, finally, to understand how legal argumentation is used, knowingly or unknowingly, to perpetuate a world view that imposes itself upon constituencies that it simultaneously leaves essentially without power or resources.

In addressing the way legal doctrine is unable to provide determinate answers to particular disputes while continuing to claim an authority based on its capacity to do so, I have drawn on another critical tradition, described loosely as post-structuralism.¹⁶ In particular, I have benefited from the “deconstructive” textual strategies developed by Jacques Derrida,¹⁷ and from the input of colleagues who are incorporating various of these techniques into their own work.¹⁸

Derrida affirms the role of conceptual duality in the discourse of philosophers since the eighteenth century, and observes that all discourse tends to favor one pole of any duality over the other, creating a hierarchical relationship between the poles.¹⁹ The disfavored pole he calls the dangerous supplement, “dangerous” because of its undermining potential, its role in revealing to us that things are not, after all, what they seem.²⁰

15. See Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW*, *supra* note 11, at 281, 284–89.

16. Three helpful introductions are J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982); *STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA* (J. Sturrock ed. 1979).

17. For an introduction, see generally Culler, *Jacques Derrida*, in *STRUCTURALISM AND SINCE*, *supra* note 16, at 154; Spivak, *Translator's Preface* to J. DERRIDA, *OF GRAMMATOLOGY*, at ix (G. Spivak trans. 1976).

18. See, e.g., Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276, 1277–96 (1984); David Kennedy, *International Legal Structures* (1984) (unpublished manuscript on file with author).

19. J. DERRIDA, *supra* note 17, at 144.

20. *Id.* An example of the dynamic of the dangerous supplement is contract doctrine's stressing of objective interpretations of contractual intent over subjective ones, invoking both the difficulty of assessing subjective intent, and the loss of predictability, stability, certainty, and security that reliance on subjective intent would produce. Yet subjective intent retains a tolerated supplemental position in

Taking as his starting point that philosophy as a discipline depends on a capacity for objective reason and transparent communication, Derrida is concerned to expose the sleight of hand by which philosophers convince their readership that language can represent an objective reality, and serve as a transparent medium of thought. He would restore us to a world in which we would be not only without a false confidence in either the power of objective reason or the possibility of transparent communication, but also without a sense of false constraint.²¹ I believe Derrida's strategies are singularly apt for the analysis of a legal order that has, like the philosophy he critiques, founded its authority on objectivity, and that presumes access to individual intentions and understandings.

In aspiring to a perspective external to the dominant discourse—an aspiration necessary for the type of analysis I develop in this piece—I have also drawn strength from feminist theory and from attempts to bring feminism to bear on legal theory.²² In understanding the central problem of our legal discourse to be a corrosive preoccupation with self and other, I

contract doctrine, being invoked quite explicitly to resolve certain doctrinal problems. An examination of the way in which subjective intent is used as supplement reveals that even as the adherence to objectivity is designed to banish the unreliable subjective, that very objectivity is in fact sustained only by its claim to incorporate and represent the subjective. Because the subjective it purports to represent is unknowable, however, the privileged objective loses its claim to dominance.

The lesson of subjective intent as supplement is that the problem of knowledge, which the dominant voice of doctrine purports to resolve by recourse to objective standards, has not in fact been contained. By assuring us that problems of understanding arise only in the realm of the subjective, doctrine "defers" or "displaces" the problem of knowledge, puts it over to some other place where it will not threaten to sabotage the project at hand.

For an illustration of the dynamic of the dangerous supplement in Derrida's own writing, see his treatment of speech and writing in Rousseau's work, *id.* at 141-64. For an illustration based on conventional understandings of the relationship between law and society, see Frug, *supra* note 18, at 1288-89.

21. Derrida has described the possibilities that would exist in such a world:

[E]verything becomes possible against the language-police; for example "literatures" or "revolutions" that as yet have no model. Everything is possible except for an exhaustive typology that would claim to limit the owners of graft or fiction by and within an analytical logic of distinction, opposition, and classification in genus and species.

Derrida, *Limited, Inc.*, 2 GLYPH 162, 243 (1977).

22. The strands of feminist theory that have most influenced my thinking are the psychoanalytic work represented by N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) and D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); the work in literary theory exemplified by J. CULLER, *supra* note 16, at 43-64; J. FETTERLEY, *THE RESISTING READER* at xi-xxvi (1978); and S. GILBERT & S. GUBAR, *THE MADWOMAN IN THE ATTIC* 3-104 (1979); and the work of radical French feminists collected in *NEW FRENCH FEMINISMS* (E. Marks & I. de Courtivron eds. 1981) and described in Stanton, *Language and Revolution: The Franco-American Dis-Connection*, in *THE FUTURE OF DIFFERENCE* 73 (H. Eisenstein & A. Jardine eds. 1980). Powerful examples of feminism brought to bear on legal materials and legal theory include MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE & SOC. 515 (1982); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC. 635 (1983); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

I use the word "aspire" to reflect that the search for an external perspective must be conducted with the awareness that we are always problematically implicated in the dominant discourse from which

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see correspondences among the “liberal” world depicted by legal scholars, the “rational” world depicted by Derrida, and the “male” world depicted by feminists.²³

D. *Implications*

It is distressingly common to interpret the kind of analysis I undertake in this Article as an attack on doctrine, as a claim that doctrinal talk is somehow “meaningless.” I hope to show that such interpretations are misperceptions. At the most practical level, my analysis suggests that the advocate’s task is precisely as traditionally imagined, a job requiring a most sophisticated sense both of the array of available argument and of the limits of legal discourse. At the level of theory, my account suggests that doctrine is redolent with meaning, that it incorporates debates about commitments and concerns central to our society. However, the usefulness of those debates is unfortunately limited by their stylized distance from the core issues they represent. Debate on these core issues is further limited by doctrine’s pretense that it can resolve these issues rather than simply articulate them in a fashion that would allow a decisionmaker to make a considered choice in the case before her.

To expose the limitations of doctrine—to reveal the poverty of legal discourse, its dependence on only a few types of feint and parry, eminently graspable—is one of the major goals of this piece. That done, it becomes possible systematically to surface the core issues underlying contractual disputes, by decoding the doctrinal formulations.

My analysis, which supports the idea that judicial decisionmaking is indeterminate, is rendered vulnerable by our experience of being able to speculate successfully about how at least some cases will come out. One response is that our ability to speculate has less to do with the determinacy of doctrine than with our sensitivity to cultural values and understandings as they impinge on and are created by our decisionmakers. This implies that while “doctrine-as-rule-system” is indeterminate, “doctrine-in-application” is after all determinate, needing just that infusion of (determinate) cultural value and understanding to make it so. But if doctrinal indeterminacy is produced, as I have suggested, by the *same* dualities that structure the rest of our life and thought, that affect the very development

we wish to extricate ourselves. “Feminism criticizes this male totality without an account of our capacity to do so, or to imagine or realize a more whole truth. Feminism affirms women’s point of view by revealing, criticizing and explaining its impossibility.” MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *supra*, at 637.

23. It therefore seems unnecessary, for the purposes of this Article, to choose among these critiques, although when it comes to looking behind and beyond doctrine to ask what is perpetrated through it, my own first commitment is to assess how women are viewed and treated in legal contexts.

of our cultural values and understandings, then indeterminacy must exist at *all* these levels. Our seeming ability nonetheless to understand and to predict (in a historically contingent fashion) the particular links that decisionmakers create between particular arguments, and the particular fact situations decisionmakers construct from the testimony submitted to them, requires us to search for other explanations.²⁴ The devaluing of doctrine clears the ground for this further work.²⁵

I. PUBLIC AND PRIVATE

The opposing ideas of public and private have traditionally dominated discourse about contract doctrine. The underlying notion has been that to the extent contract doctrine is "private," or controlled by the parties, it guarantees individual autonomy or freedom; to the extent it is "public," or controlled by the state, it infringes individual autonomy.

Since at least the mid-nineteenth century, the discourse of contract doctrine has tried to portray contract as essentially private and free.²⁶ At all times, nonetheless, traditional doctrine has uneasily recognized a public aspect of contract, viewing certain state interests as legitimate limitations on individual freedom. But this public aspect has traditionally been assigned a strictly supplemental role; indeed, a major concern of contract doctrine has been to suppress "publicness" by a series of doctrinal moves.

The public aspect of contract doctrine is suppressed differently in each area of that doctrine, and in each historical period. The method of suppression is generally either an artificial *conflation* of public and private,

24.

Anything we know is outside
of rational expression. Do we know
anything? No, of course we don't.
What we know is not true and what is true
is beyond our knowing; knowing is not the point.
But we are aware of something and, in that sense,
we know. . . .

W. BRONK, *Rational Expression*, in *LIFE SUPPORTS: NEW AND COLLECTED POEMS* 210 (1982).

25. The work of Foucault offers a highly relevant model, in its intricate examination of the relationship between knowledge and power, or the "régime du savoir," as it operates in the development of both social institutions and disciplines of learning, and their interaction. See, e.g., M. FOUCAULT, *THE HISTORY OF SEXUALITY* (1978); Foucault, *Afterword: The Subject and Power*, in H. DREYFUS & P. RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 208 (1982). On the methodology of "thick description," see C. GEERTZ, *THE INTERPRETATION OF CULTURES* 3-30 (1973) (discussing use of this technique in anthropological research to produce ethnographic descriptions that advance interpretive rather than scientific theory of culture).

26. To borrow from Kessler:

The freedom of contract dogma is the real hero or villain in the drama . . . but it prefers to remain in the safety of the background if possible, leaving the actual fighting to consideration and to the host of other satellites—all of which is very often confusion to the audience which vaguely senses the unreality of the atmosphere.

Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 639 (1943).

in which the public is represented as private, or an artificial *separation* of public from private, which distracts attention from the public element of the protected “private” arena by focusing attention on the demarcated (and limited) “public” arena.

The current mainstream treatment of quasi-contracts and implied contracts illustrates doctrine’s techniques of separation and conflation. The prevailing position, represented by the *Second Restatement*, but also by cases and commentary from the 1850’s to the present, is that quasi-contracts are not contracts at all, but constitute instead an exceptional imposition of obligation by the state in order to prevent unjust enrichment. An artificially sharp line of demarcation is therefore presented as separating quasi-contracts from implied-in-fact contracts, and public from private. But this position obscures the fact that the finding of contractual implication is guided in the so-called “private” sphere by the same considerations that dictate the imposition of quasi-contract. Any inquiry into a party’s intent must confront the problem of knowledge—our ultimate inability to gain access to the subjective intent underlying any particular agreement. The indicia or manifestations of intent, discussed in detail in Part II, serve as substitutes for subjective intent. But in relying on this objective evidence, we move from the realm of the private to that of the public. Calling implied contracts based on party intention “private,” and thereby ignoring the extent to which their content is shaped by external norms, conflates public with private.

This same pattern of separation and conflation characterizes the doctrines of duress and unconscionability. Like quasi-contract, they are presented in current doctrine as public supplements to the otherwise private law of contract, supplements necessary for policing the limits of fair bargain. The separation of duress and unconscionability from the main body of contract doctrine diverts attention from the fact that the entire doctrine of consideration reflects societal attitudes about which bargains are worthy of enforcement. But even as the technique of separation marks out duress and unconscionability as public exceptions to private contract doctrine, within duress and unconscionability doctrine public and private are conflated—the public grounds for disapproving bargains recast as evidence that there is no private bargain to be enforced. In this arena, the techniques of separation and conflation serve to camouflage critical issues of power—the power of the state to police private agreements, and the power of one private party over another. These issues lie not only at the heart of duress and unconscionability doctrine, but also at the heart of consideration doctrine, as Part III of this Article elaborates.

My analysis of public and private starts with a brief historical overview of the way these themes have been treated in contract doctrine since the

nineteenth century. I then examine in greater detail the suppression of the public aspect of contract in doctrine's treatment of quasi-contract, and in the rules governing duress and unconscionability.

A. *A Brief History*

In the earlier part of the nineteenth century, a will theory of contract dominated the commentary and influenced judicial discussion.²⁷ Contractual obligation was seen to arise from the will of the individual. This conception of contract was compatible with (and early cases appear sympathetic to) an emphasis on subjective intent: Judges were to examine the circumstances of a case to determine whether individuals had voluntarily willed themselves into positions of obligation.²⁸ In the absence of a "meeting of the minds," there was no contract.²⁹ This theory paid no particular attention to the potential conflict between a subjective intention and an objective expression of that intention.

The idea that contractual obligation has its *source* in the individual will persisted into the latter part of the nineteenth century, consistent with the pervasive individualism of that time and the general incorporation into law of notions of liberal political theory.³⁰ Late nineteenth-century theorists like Holmes and Williston, however, began to make clear that the proper *measure* of contractual obligation was the formal expression of the will, the will objectified. Obligation should attach, they reasoned, not according to the subjective intention of the parties, but according to a reasonable interpretation of the parties' language and conduct. Enforcement of obligation could still be viewed as a neutral facilitation of intent, despite this shift, if the parties are imagined as selecting their language and conduct as accurate and appropriate signals of their intent.³¹ Thus, even in this objectified form, the will theory of contract was equated with the

27. See, e.g., P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 405-08 (1979) (tracing the emergence of will theory in late 18th and early 19th centuries).

28. "[W]hen both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted." *Haynes v. Haynes*, 1 Dr. & Sm. 426, 433, 62 Eng. Rep. 442, 445 (1861).

29. See, e.g., *Dickinson v. Dodds*, 2 Ch. D. 463 (1876); *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864), and the discussion of these cases in G. GILMORE, *THE DEATH OF CONTRACT* 28-29, 35-42 (1974).

30. See, e.g., P. ATIYAH, *supra* note 27, at 407-08; Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575-78 (1933); Feinman, *supra* note 14, at 831-32.

31. "There is no contract without assent, but once the objective manifestations of assent are present, their author is bound." Kessler, *supra* note 26, at 630. "The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law." Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). Fuller also suggests that autonomy is dependent upon "security of transactions," and that "security of transactions" is by-and-large guaranteed by objective interpretation, even though objective interpretation may defeat party intention in particular instances. *Id.* at 808.

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absence of state regulation: The parties governed themselves; better yet, each party governed himself.³²

The Realists made it impossible to believe any longer that contract is private in the sense suggested by this caricature. By insisting that the starting point of contract doctrine is the state's decision to intervene in a dispute, the Realists exposed the fiction of state neutrality. As Morris Cohen argued:

[I]n enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. 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.³³

From this vantage point, the objectivist reliance on intent as the source of contractual obligation was a blatant abdication of responsibility, a failure to address and debate the substantive public policy issues involved in decisions about when and how courts should intervene in disputes between contracting parties.

At its most radical, the Realist critique portrays the “publicness” of contract as overshadowing its “privateness.” According to Cohen, “[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.”³⁴ Thinking about contract from this perspective revealed that the state's interest in maintaining a free enterprise system—while policing its excesses—was at work in doctrines such as duress and consideration.³⁵ Problems of power—the state's power over individuals, and the power of individuals over one another—came into focus.

This basic challenge to the “privateness” of contract, however, was accompanied by a continuing faith in the ability of courts to understand the agreements made by contracting parties. For example, the contract was felt to restrain the terms on which the court, if it chose to intervene, would

32.

Contractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise only out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and that the government is best which governs least. This in turn is connected with the classical economic optimism that there is a sort of preestablished harmony between the good of all and the pursuit by each of his own selfish economic gain.

Cohen, *supra* note 30, at 558.

33. *Id.* at 562. See also Feinman, *supra* note 14, at 834.

34. Cohen, *supra* note 30, at 586.

35. See Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 266 (1947); Kessler, *supra* note 26, at 638–39.

favor one party over the other. In the hands of the Realists, then, a sensitivity to the problem of power was coupled, by and large, with an apparent lack of sensitivity to the problem of knowledge, and to the way in which power could be subtly exercised through the interpretation and construction of intention.³⁶

In the decades since, the Realist challenge to the "privateness" of contract has been assimilated and defused, a process aided by the incomplete nature of the Realist assault. Thus our principal vision of contract law is still one of a neutral facilitator of private volition. We understand that contract law is concerned at the periphery with the imposition of social duties, that quasi-contract governs situations where obligation attaches even in the absence of agreement, that doctrines of duress and fraud deprive the contracting reprobate of benefits unfairly extorted. But we conceive the central arena to be an unproblematic enforcement of obligations voluntarily undertaken. We excise regulated and compulsory contracts from the corpus of contract doctrine altogether, and create special niches for them, as in labor law and utility regulation. Although we concede that the law of contract is the result of public decisions about what agreements to enforce, we insist that the overarching public decision is to respect and enforce private intention.

Thus, for better than a hundred years, contract doctrine and the commentary it has generated have been characterized by a concern with public imposition and private volition. In the remainder of this section, I explore in much more detail how the public-private dichotomy has influenced doctrine in both the area of the implied contract and in that of duress and unconscionability. I begin each story with some history, and end each by suggesting that our modern formulations do nothing more than give a new disguise to age-old problems.

B. *The Implied Contract Story: Wrestling with the Problem of Knowledge*

The implied-in-law or quasi-contract plays a crucial role in sustaining the notion that contract law is essentially private. The implied-in-law contract is portrayed as essentially non-contractual and public, in contrast to

36. Jerome Frank is an exception, in that he did consistently focus on the problematic relationship between subjective and objective in the area of contractual interpretation. On occasion, he stresses the vagaries of competing idiosyncratic subjectivities, as, for example, in *Zell v. American Seating Co.*, 138 F.2d 641, 647 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) (per curiam), reprinted in KESSLER & GILMORE, *supra* note 8, at 679. See *infra* text accompanying note 162. Elsewhere, he suggests the possibility for a more systematic imposition of cultural norms. See, e.g., J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 309 (1969).

the implied-in-fact contract in which the private is dominant. In this account, the implied-in-fact contract is presented as kin to the express contract, the only difference being that the former is constituted by conduct and circumstance rather than words.³⁷ An examination of how and when courts choose to impose quasi-contractual obligations, however, reveals the essential similarity between this decision and the supposedly dissimilar decision that a given situation evidences implied-in-fact contractual obligations. Thus, although the distinction between the two types of implied contracts accords with our experience—we intuitively know that being bound by one's word is different from being bound by an externally imposed obligation—the methods of legal argument used for over one hundred years to distinguish the two situations do not and cannot hold.

1. Hertzog—*The Constructive Contract*.

Hertzog v. Hertzog,³⁸ decided by the Pennsylvania Supreme Court in 1857, is reputedly the first American case to distinguish the quasi-contract from the implied-in-fact contract. The themes and method of analysis present in *Hertzog* still reverberate in the treatment of implied contract found in the *Second Restatement* and in modern case law.

In *Hertzog*, an adult son lived and worked with his father until his father's death, at which point the son sued the estate for compensation for services rendered.³⁹ The trial judge instructed the jury that John Hertzog could recover only if an employment contract existed between father and son. Two witnesses gave testimony that could be interpreted as evidence of such an agreement: One Stamm testified that he "heard the old man say he would pay John for the labour he had done,"⁴⁰ while one Roderick swore that the father "said he intended to make John safe."⁴¹ The jury found for John, and the defendant appealed, successfully.

Pennsylvania Supreme Court Justice Lowrie begins the opinion by distinguishing express, implied-in-fact, and implied-in-law contracts.⁴² In advancing this categorization, Lowrie particularly criticized Blackstone for failing to distinguish the implied-in-fact from the implied-in-law contract.⁴³

37. See, e.g., RESTATEMENT (SECOND), *supra* note 6, § 4 comments a & b.

38. 29 Pa. 465 (1857). The case is reprinted in KESSLER & GILMORE, *supra* note 8, at 120. In this account I am indebted to Duncan Kennedy, who discusses the emergence of the modern concept of quasi-contract in *The Rise and Fall of Classical Legal Thought: 1850–1940*, at 19–24 (Chapter IV) (Oct. 1975) (unpublished manuscript on file with author).

39. The suit also involved repayment of a loan, but that aspect is not treated here.

40. *Hertzog*, 29 Pa. at 465.

41. *Id.* at 466.

42. *Id.* at 467; see also RESTATEMENT (SECOND), *supra* note 6, § 4 comments a & b (presenting parallel modern treatment of different types of contracts).

43. *Hertzog*, 29 Pa. at 467.

Blackstone had suggested that “[i]mplied [contracts] are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform.”⁴⁴ Lowrie, true to his advanced understanding of the implications of the will theory of contract, observes, “There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills.”⁴⁵ The only “contracts” that reason and justice dictate, according to Lowrie, are “*constructive* contracts” in which the contract is “mere fiction,” a form adopted solely to enforce a duty independent of intention.⁴⁶ “In one,” says Lowrie, “the duty defines the contract; in the other, the contract defines the duty.”⁴⁷

Lowrie offers this definition of quasi-contract:

[W]henever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, [this is] a case of [quasi-]contract.⁴⁸

For Justice Lowrie, quasi-contract, unlike contract proper, reflects public norms. Public norms, however, require legitimation, and Lowrie offers two types—one positivist, the other dependent on natural law. The norms are “positively” binding because they are part of the body of common law or statute recognized as authoritative. They are “naturally” binding because they reflect “common sense and common justice.”⁴⁹ While Lowrie distinguishes these public obligations from obligations based on consent, he invokes consent to legitimize public norms: Consent underlies his distinction between “*variant* notions of reason and justice” and “*common* sense and *common* justice.”⁵⁰

Lowrie avoids the need to devote more time and attention in *Hertzog* to quasi-contract by stating that “[i]n the present case there is no pretence of a constructive contract, but only of a proper one, either express or implied.”⁵¹ The focus of the opinion, then, is on whether John Hertzog can demonstrate the existence of a contract by words spoken or by an account of the relationship and circumstances.

44. *See id.* (quoting 2 W. BLACKSTONE, COMMENTARIES *443).

45. 29 Pa. at 467.

46. *Id.* at 468 (emphasis in original).

47. *Id.*

48. *Id.* at 467.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.* at 468.

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As to the express contract, Lowrie explicitly uses the parties' relationship and their circumstances to "frame" the words spoken in such a way that they become words of "non-contract" instead of contract:

The court told the jury that a contract of hiring might be inferred from the evidence of Stamm and Roderick. Yet these witnesses add nothing to the facts already recited, except that the father told them, shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.⁵²

The father-son relationship clearly influences Lowrie's conclusion. *Hertzog* thus illustrates that words of intention are inconclusive until they are shaped by a judicial reading of the context in which they are uttered. Even the paradigmatically self-sufficient "express" contract, in which "the terms of the agreement are openly uttered and avowed at the time of the making,"⁵³ is invaded by "publicness" in its interpretation and enforcement.

In regard to the implied-in-fact contract, Lowrie says that "[t]he law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties."⁵⁴ In *Hertzog*, Lowrie's willingness to find an employment contract will therefore turn on whether the parties are related: He assumes that strangers assist one another only on the expectation of reward,⁵⁵ whereas precisely the opposite is true of employment between intimates.⁵⁶

Lowrie thus bases his conclusion that no implied contract exists almost entirely upon "the customs of society"⁵⁷ and commonly accepted notions about human nature in general and family relationships in particular.⁵⁸

52. *Id.* at 470.

53. *See id.* at 467 (quoting 2 W. BLACKSTONE, *supra* note 44, at *443).

54. 26 Pa. at 468.

55. *Id.* at 469. Judge Lowrie wrote: "If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference." *Id.*

56. *Id.* "But if we find a son in the employment of his father," Lowrie writes, "we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract." *Id.*

Actually Lowrie goes further in his analysis of father-son employment. On the one hand, it deems sons to put them in the legal position of hired servants, when they are characteristically much superior. On the other, the son who fails to strike out on his own is a burden to his father; the father supports such a son because he "lack[s] the energy and independence necessary for such a course," not because the father desires to employ him. *Id.* On this reading the son is inferior to the hired servant.

57. *Id.*

58. *Id.*

But his reliance on such customs and commonalities hopelessly undermines his distinction between contracts implied-in-fact and quasi-contracts. Lowrie's treatment of the absence of a contract proper could just as easily be read as an account of the absence of a quasi-contract. Plainly he has decided that common sense and common justice demand a finding that no contract exists here. The advantage of his contractual analysis is that it permits public considerations to be introduced as if they were private, without the elaborate scrutiny of their source and justification that a quasi-contractual analysis would require.

Lowrie's concluding ruminations about the jury's finding for the son ironically illustrate his obliviousness to the "publicness" of his analysis:

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. But this is a despotic power, and is lodged with no portion of this government.

Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connexions on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen.⁵⁹

This moralizing might be more convincing if the judge had not just exercised, in the guise of fact-finding, the type of state power he now labels "despotic."⁶⁰

In resolving this dispute, then, Lowrie proves incapable of sustaining the distinction between public and private on which he places so much emphasis. He asserts that the intrusion of the state into the relationships of private individuals is generally undesirable. He suggests that in extreme circumstances such intrusion can be justified, provided we impose only those obligations grounded both in community standards and in positive promulgation. In normal circumstances, however, contract law is purely about the intentions of the parties. Disciplined and rational judges, aware of the limitations of their authority, are better equipped to discern these intentions than undisciplined and irrational juries who confuse their sense of what is fair and honest with what the parties had in mind. But when it comes to deciding the case, Lowrie uses standards that were neither explicitly adopted by the parties nor promulgated by the state. In

59. *Id.* at 470-71.

60. *Id.* at 471.

determining that the relationship between the parties was not contractual, he invokes common understandings about the context of the agreement to transform words of agreement into evidence of non-contract. In so doing he avoids the problem of power by appearing to endorse the parties' own choice that their relationship be without legal consequence, and avoids the problem of knowledge by presenting his own normative interpretation of the situation as nothing more than a transparent reading of the parties' intentions.

2. *Since Hertzog—Plus Ça Change . . .*

By the first decades of this century, theorists had begun cautiously to explore the extent to which an objectified will theory required public intrusion on private volition. In 1920, for example, Costigan⁶¹ suggested that quasi-contractual obligations could not be successfully separated from implied-in-fact obligations without recognizing that there were, in addition to “meeting-of-the-minds implied-in-fact contract[s],”⁶² those implied-in-fact contracts that were *not* based on meetings of minds. Costigan's prime example was the implied warranty, which he described in terms that would also apply to Lowrie's analysis of the absence of contract in *Hertzog*: “Implied warranties are founded upon the implied facts of general . . . experience and understanding—implied because people in general, and not necessarily the particular parties concerned, when acting understandingly and fairly, normally agree upon such an assumed factual basis”⁶³ As the quotation suggests, Costigan explicitly recognizes that the actual intent of the parties is not the basis of the obligation in these cases. At the same time, rather than asserting explicitly the “public” interest in the imposition of such terms, he “privatizes” the imposition of obligation by reference to what other fair-minded people *would* intend under similar circumstances.

Costigan is left having to explain why his category of “no-meeting-of-the-minds” contracts are still contracts rather than quasi-contracts. To this end, he focuses initially on the remedy attached: Where the court awards a restitutionary measure, the action is quasi-contractual; where an expectation measure is awarded, the action is contractual.⁶⁴ Costigan himself, however, later recognizes that this position is indefensible: He acknowledges that “[t]he contractual right justifies the measure of damages,

61. Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1920).

62. *Id.* at 383.

63. *Id.* at 384–85; *see also* Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 450–51 (1929) (role of custom and common understanding in implication (in fact) of promises).

64. Costigan, *supra* note 61, at 378.

not the measure the right."⁶⁵ Ultimately, then, he fails to demonstrate how these cases can be viewed as contractual without the parties' minds having met.⁶⁶

As I have already sketched,⁶⁷ the Realist approach to contract involves a radical shift of emphasis from the private to the public aspects of enforcement. Predictably, then, when the Realist Cohen addresses the question of interpretation, he sees and describes its public face. He pinpoints the way in which judges, in the guise of interpretation, "decide the 'equities,' the rights and obligations of the parties [T]hese legal relations are determined by the courts and the jural system and not by the agreed will of the contesting parties."⁶⁸ Cohen also identifies how rules of interpretation serve as state regulation:

When courts follow the same rules of interpretation in diverse cases, they are in effect enforcing uniformities of conduct.

We may thus view the law of contract not only as a branch of public law but also as having a function somewhat parallel to that of the criminal law. Both serve to standardize conduct by penalizing departures from the legal norm.⁶⁹

Cohen laments that while the fictional nature of the will theory is at one level a commonplace, it is at the same time ignored, forgotten, or otherwise resisted—in part, because of the force of the traditional language.⁷⁰ And indeed, the Realists did generally fail to explore the implications of the will theory's fictional basis. They tended to be much more concerned with problems of coercion and of relief from the bad bargain. The Realist focus was the public-private split as it implicates the problem of power, not the public-private split as it implicates the problem of knowledge. Since the line of inquiry initiated by those such as Costigan has been given only scant attention in the following decades, Cohen's criticism could be levelled with equal force today.

65. *Id.* at 390.

66. He suggests that his earlier discussion of *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909), reprinted in *KESSLER & GILMORE*, *supra* note 8, at 139, has "foreshadowed" this demonstration. Costigan, *supra* note 61, at 390. It has not. Later in the article, he refers back to the earlier discussion and he claims that "the real nature of the primary right . . . was contractual." *Id.* at 400 n.37. It is not clear why.

67. See *supra* Part IA.

68. Cohen, *supra* note 30, at 577.

69. *Id.* at 589. Fuller is elaborating a similar idea when he details the "channeling function" of consideration. Fuller, *supra* note 31, at 801-03.

70. "[W]hile this objection has become familiar," Cohen writes, "it has not been very effective. The force of the old ideas, embodied in the traditional language, has not always been overcome even by those who like Langdell and Salmond profess to recognize the fictional element in the will theory." Cohen, *supra* note 30, at 575.

The position taken by the *Second Restatement* is essentially that of Justice Lowrie. The *Second Restatement* divides the universe of contracts along the private-public axis into express contracts, contracts implied-in-fact, and contracts implied-in-law or quasi-contracts. It defines the express contract as an agreement made up of words, either oral or written, and the implied-in-fact contract as one that a court infers wholly or partly from conduct or circumstances.⁷¹ Quasi-contracts, in contrast, are “public.” And because they are not concerned with the intentions of the parties, they are not really contracts at all.⁷² That quasi-contracts even share the appellation “contract” is a matter of historical accident.⁷³ Like torts, quasi-contracts are “obligations created by law for reasons of justice.”⁷⁴ Their non-contractual nature is so essential that they are separated out for treatment in the *Restatement of Restitution*.⁷⁵ Only that fact even alerts us that the “reasons of justice”⁷⁶ that dictate the imposition of quasi-contractual obligations have to do with the idea of unjust enrichment.

At the same time, the *Second Restatement of Contracts* confesses that this analytically clear distinction between contract and quasi-contract does not always work in practice, that “in some cases the line between the two is indistinct.”⁷⁷ The *Restatement* attributes the potential for confusion to the difficulties of “Conduct as Manifestation of Assent.”⁷⁸ Except where formal requirements give words special significance as evidence of agreement, “there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways

71. Thus, the promise “may be stated in words either oral or written, or may be inferred wholly or partly from conduct.” RESTATEMENT (SECOND), *supra* note 6, § 4. Comment a elaborates:

Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

Id.; see also *id.* § 19 comment a (assent may be manifested in words or in acts, with no distinction as to effect of promise).

72. *Id.* § 4 comment b.

73.

Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice. Such obligations were ordinarily enforced at common law in the same form of action (*assumpsit*) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts has been caused thereby.

Id.

74. *Id.*

75. See RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1937).

76. RESTATEMENT (SECOND), *supra* note 6, § 4 comment b.

77. *Id.*

78. *Id.* § 19 comment a.

and partly in others.”⁷⁹ But conduct “is more uncertain and more dependent on its setting than are words.”⁸⁰ The uncertainty of conduct as evidence of agreement can make it unclear whether a particular relationship should be considered contractual or quasi-contractual.

This explanation allows the *Restatement* to save the express contract from involvement in potential confusion between public and private. Words that directly express the parties’ intentions make state intrusion unnecessary. Only conduct, inherently more ambiguous and open-textured, threatens the public-private distinction by requiring the interpreter of fact to add his sense of the context to the acts of the parties in order to understand them.⁸¹

As *Hertzog* demonstrates, however, the division between public and private cannot be so neatly made. Divining intention in order to find an implied-in-fact contract depends on understanding the societal background against which a relationship is formed: A knowledge of private thus requires a knowledge of public. Deciding that a social relationship requires the imposition of a quasi-contract depends on knowing which relationship the parties have entered: A knowledge of public thus requires a knowledge of private.

In failing to account successfully for the kinship of the implied-in-fact and quasi-contract, the *Restatement* is not an aberration in modern treatments. The note in Kessler and Gilmore’s casebook⁸² introducing the topic of the implied contract also fails in this regard. The note begins by repeating the standard distinction between “genuine” contracts and the fictional quasi-contract, but warns that the “famous, plausible and innocent-looking” distinction raises “a host of troublesome questions.”⁸³ The next passage of the note is a spectacular account of how what is commonly conceived of as private in the realm of contract formation and interpretation is in fact public. In a short compass, Kessler and Gilmore suggest that in one sense all contracts, even express ones, are implied: that express

79. *Id.*

80. *Id.*

81. The *Second Restatement* provides an example apparently intended to provide further reassurance. See *id.* § 19 comment a, illustration 1. The example involves a claim “against a decedent’s estate for services rendered”—the *Hertzog* situation. *Id.* § 19 comment a. Because one of the parties to the relationship is dead, his “words” are unavailable as evidence; because of the Dead Man’s Statute, words exchanged between the parties are probably also inadmissible. Conduct and circumstance are therefore peculiarly preponderant as evidence of whether “services were rendered gratuitously.” *Id.* The carefully delimited parameters of the hypothetical convey a message: Only in exceptional circumstances do courts risk crossing the line between enforcing private agreement and imposing external obligations; “publicness” will not invade the area of the express contract.

82. See KESSLER & GILMORE, *supra* note 8, at 116–19.

83. *Id.* at 117.

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contracts are possible only through “a regulation which is originally social”;⁸⁴ that “environment” is crucial;⁸⁵ that “official control becomes an integral part of the contract itself”;⁸⁶ and that the courts’ habit of presenting their enforcement task as one of “interpretation” obscures the “degree of control over private volition thus exercised.”⁸⁷

Then, abruptly, the note introduces the concept of quasi-contract. Early in its treatment we are warned: “If it [quasi-contract] is unduly extended, private autonomy . . . will suffer erosion.”⁸⁸ The degree of erosion demonstrated in the interpretation of contracts proper was never explicitly presented as this kind of a threat, however, and it is not clear why the threat inheres in quasi-contract and not in contract.

At this point the very distinction about which the authors expressed doubt in their opening paragraphs is reintroduced as essential: Although the “borderline” may be “wavering and blurred,”⁸⁹ the boundary is “necessary,” and “not to be ignored.”⁹⁰ The separation of quasi-contract and contract is vital, not just for the sake of private autonomy, but because of the different remedies attaching, even though in many situations the measure of recovery is the same.⁹¹ We are also warned that judges are not as good at recognizing the essentially different natures of these kinds of contracts as we will presumably be once we have digested the elaborate “guidance” the note provides.⁹²

There are manifold messages here. Kessler and Gilmore understand the world of contract to be more complicated and difficult than the standard division into implied-in-fact and implied-in-law would indicate. They fully and sympathetically present the problem of knowledge as it affects issues of interpretation. But this insight is not permitted to influence their treatment of the quasi-contract, which is still presented as the place where the real threat to privateness exists. In shoring up the distinction between real and quasi-contracts by referring to the remedies attached, Kessler and Gilmore repeat Costigan’s mistake—unless their point is instead that we *should* draw this distinction in order to know what remedy is appropriate. This is different from Costigan’s claim that the remedy given lets us know what kind of action we are dealing with, but it leaves us asking why we

84. *Id.*, (quoting T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 311 (1949)).

85. KESSLER & GILMORE, *supra* note 8, at 117.

86. *Id.* at 118 (quoting J. CLARK, *SOCIAL CONTROL OF BUSINESS* 100 (2d ed. 1939)). In support of this proposition, Kessler and Gilmore cite *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934). See KESSLER & GILMORE, *supra* note 8, at 118.

87. KESSLER & GILMORE, *supra* note 8, at 118.

88. *Id.* at 119.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

should base a choice of remedy on so weak a foundation. Kessler and Gilmore's final move of pinning the blame on judges deflects attention from the inadequacies of the conceptual scheme itself.

The inadequacies of Kessler and Gilmore's treatment echo those evident in the *Second Restatement* and in *Hertzog*. None of the accounts fully acknowledges the interrelationship of public and private. None adequately recognizes that public concerns and conceptions necessarily inform the judicial decision about whether to impose contractual obligations. None suggests that quasi-contractual obligation depends on prior understandings of the private relationship of the parties. Once these inter-relationships are understood, as the (failed) attempt to distinguish contract from quasi-contract allows us to understand them, the public-private dichotomy threatens to dissolve.

C. *The Story of Duress and Unconscionability: Wrestling with the Problem of Power*

The efforts of more than a century have been devoted, as we have seen, to trying to create a private domain in which individuals can reach binding agreements and courts can enforce them, despite the difficulties presented by the problem of knowledge. The story of the doctrines of duress and unconscionability reveals similar efforts over time to create a private domain in which individuals can reach binding agreements and courts can enforce them, despite the difficulties presented by the problem of power. In the context of duress and unconscionability, doctrine wrestles with the power of contracting parties over one another, and the power of the state over both.

The doctrines of duress and unconscionability are self-consciously "public" insofar as they are designed to police the limits of "fair" bargain. They legitimate the exercise of state power to prevent one contracting party from exercising an illegitimate power over the other. Thus, the private deal of the parties—or what appears to be the private deal of the parties—may be overridden in the name of a norm that, under appropriate circumstances, trumps the otherwise prevalent norm of non-intervention.

In a discourse so protective of its private or non-interventionist status, this is a dangerous move that raises a number of interesting questions: Why should contract have to harbor such a public aspect? When is intervention justified? How has this public aspect of contract been reconciled over time with the rest of "private" contract doctrine? What does this particular story reveal about the body of doctrine to which it bears such a dangerously supplemental relationship? While this section will explore all

these questions, discussion of the first two figures most prominently in the work of traditional theorists.

The “why” question has both a private and a public answer. The private answer is that since privacy in contract is conceived of as a guarantor of freedom, contracts entered into under coercion are not deserving of that privacy—indeed, under those circumstances, state intrusion becomes the guarantor of freedom. The public answer is that we have some values that occasionally trump our desire for a system of contract in which each party bears full responsibility for protecting his own interests. We conceive some limit to self-interest, some requirement that under certain circumstances contracting parties should look out for one another, and we are prepared to use the power of the state to enforce that obligation.⁹³

The “when” question reveals the extent of the problem of power. Three different approaches to the question are embedded in contract doctrine as it has evolved since the nineteenth century. One approach is to focus on the disfavored party, and ask whether that party’s assent to the transaction was genuine. Another approach is to focus on the behavior of the favored party, and to rule that some kinds of behavior between contracting parties are unacceptable. A third approach is to look at the terms of the transaction itself, and to determine that some deals are just too lopsided to be enforceable.

The first approach—determining whether the disfavored party genuinely assented—is rendered unworkable by the problem of knowledge. We cannot directly know or ascertain the subjective intent of the disfavored party. Our inquiry therefore becomes indirect—we turn to objective evidence of the party’s subjective intent. But in our search for objective evidence we find ourselves abandoning our initial focus, and focusing instead, as the second and third approaches suggest, on the other party’s behavior and the terms of the resulting deal. Could anyone resist the pressure exerted by *that* threat, *those* circumstances? Would anyone have voluntarily agreed to *that* deal?

The second and third approaches each embody an assumption that we can distinguish the acceptable from the unacceptable; the attempt to make this distinction throws us directly into the problem of power. We live with two convictions—that we should take care of ourselves and that we should take care of others—and we lack any conceptual or instrumental scheme sufficiently persuasive in its neutrality or its appeal to consensual values

93. For statements of the content of these impulses of “individualism” and “altruism,” see Kennedy, *supra* note 10, at 1713–22. For a caveat about the precision with which these impulses can be identified in operation, see *id.* at 1722–24. Finally, for an account of the way in which the impulses collide in modern legal thought, see *id.* at 1731–37, 1766–78. Kennedy’s account connects the contradiction between individualism and altruism to the broader tension between subject and object that I have suggested is the basis for the other polarities I describe. *Id.* at 1766–78.

to regulate when one impulse should predominate. How, then, should we determine that some self-interested behavior is beyond the pale, but some other is not? How should we determine that some transactions are acceptable in their terms but others are not?

These questions go to the heart of the problem of power—the power of the state to control private arrangements and to evaluate private power relations. Doctrine attempts to deny that these questions can be answered only by recourse to non-neutral and non-consensual choices. Since doctrine's devices for denial suppress the public aspect of duress and unconscionability, they also serve to reconcile those doctrines with the otherwise private face of contract.

One device, at once evasive and reconciliatory, conflates public and private by shifting attention from the behavior of the favored party or the terms of the transaction back to the subjective assent of the disfavored party—a seemingly private inquiry. The refuge provided by this technique is scarcely adequate, of course, for reasons just explored: Because any search for subjective intent encounters the problem of knowledge, doctrine cannot remain lodged in the subjective, but must venture out again into the territory of the objective, where the problem of power remains.

Alternatively, another favored device is to present duress and unconscionability as doctrines policing process, not substance. This technique of separation admits public involvement, but reassures that the public decisions are being made in neutral and consensual territory—the territory of bargaining process. To the extent that this illusion can be maintained, the dangerous questions of substance are left in the private sphere. The problem is that found in any shift from substance to form: We are incapable of identifying form, let alone distinguishing the proper from the defective form, without recourse to the very substance we were hoping to escape.

An important illustration of this latter technique is the translation of bad behavior into a procedural concern. Sometimes privacy is presented as inhering above all in the power of private individuals to set the substantive terms of their exchanges. Accordingly, to protect privacy, courts must scrupulously avoid evaluating those terms. A focus on bad behavior, presented as a policing of bargaining *process*, thereby becomes a less problematic intrusion than a focus on the substance of the resulting exchange. The substantive nature of judging behavior is thus disguised, or the norms of conduct presented as more neutral and/or consensual than any norm of exchange.

A final device is to acknowledge the difficulties and dangers of public duress and unconscionability doctrine, but to reassure by limitation: These doctrines are to be applied only in the extreme case; they stand in glaring

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contrast to the rest of (private) contract doctrine. Actually, this inquiry ultimately reveals how all of contract doctrine is as “public” as these supposedly exceptional cases. Or, it would be equally true to say, duress and unconscionability turn out to be just as private as the rest of contract doctrine—which is not nearly as private as traditional theory would have it.

1. *Duress as the Absence of Will*

Including duress within the core of contract doctrine seemed appropriate, even necessary, to nineteenth century will theorists, who believed that enforcement of contracts was all about implementing the free wills of the parties.⁹⁴ They believed contract required assent; voluntarism was the heart of contractual obligation.⁹⁵ In developing a body of duress doctrine, the crucial issue was therefore the reality of assent.

The idea that the state could exert control in the name of freedom was easy to assert as an abstraction, but it was difficult in practice to make intervention look like nonintervention. Courts had to make concrete decisions about what was freedom and what coercion in specific contractual situations. They had to struggle with the fact that the whole economic structure quite obviously depended on the law accepting as legitimate countless deals imposed by one party upon another. The judicial identification of “unfreedom” became an uncertain task of drawing lines between acceptable and unacceptable “unfreedom.” The line-drawing exercise actually took the form of distinguishing between unacceptable and acceptable behavior by the favored party, although this focus was not made explicit.

The United States Supreme Court in *Coppage v. Kansas*⁹⁶ exposed these difficulties in a completely self-conscious way. The Kansas state legislature had passed a statute outlawing “yellow-dog” contracts by which employees agreed, as a condition of their employment, not to engage in union activities.⁹⁷ The Court addressed the constitutional question of whether this statute invaded the private right of the parties to contract.

94. See Dawson, *supra* note 35, at 256.

95. “[A] present exchange of goods or promises is a pure expression of voluntarism. In turn, this expression of voluntarism required intelligible legal rules to separate free bargains from those formed under fraud, duress, or undue influence.” Mensch, *Freedom of Contract as Ideology* (Book Review), 33 STAN. L. REV. 753, 763 (1981) (footnotes omitted). Dawson provides an updated version of this traditional legitimating rhetoric of conflation when he suggests:

If inequality in values is . . . traced to its source in the conditions or the relations of the parties, the grant of judicial remedies seems no longer to endanger the economic foundations of an individualistic society. On the contrary, the function of judicial remedies becomes a policing function, the detection and correction of those factors which disturb and disrupt the “market.”

Dawson, *supra* note 35, at 281.

96. 236 U.S. 1 (1915).

97. See *id.* at 6–7.

The state argued that since the outlawed contracts were the product of coercion, the statute did not encroach on freedom.⁹⁸ The Supreme Court disagreed. Readily acknowledging the fact of employer bargaining advantage, the Court nonetheless held that economic coercion did not violate objective notions of freedom of contract. The Court held the contracts at issue to be "free" contracts under the law, and deemed unconstitutional the legislature's intrusion into this "private" sphere.⁹⁹

The Court's opinion evidences a highly sophisticated appreciation of the irreconcilability of two constitutional guarantees: freedom of contract and the right to property.¹⁰⁰

[W]herever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.¹⁰¹

The Court therefore acknowledged that its resolution of the problem of duress in *Coppage* was a matter neither of logical necessity nor of intellectual inevitability, but represented the simple choice of a route of delimitation.¹⁰² The Court chose as its paradigm of duress the situation in which

98. See *id.* at 4 (argument for defendant-in-error).

99. The Court in *Coppage* stated:

So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Id. at 10-11 (quoting *Adair v. United States*, 208 U.S. 161, 174-75 (1908)); see also Mensch, *supra* note 11, at 23-26 (describing classical approach to contract dispute resolution whereby courts adhered to "objective" notions of freedom defined independently of real-world power relations); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 361 (1979) (questioning Court's ability in *Coppage* to apply "objective" criteria distinguishing between free will and coercion).

100. For a parallel discussion of the way in which the law of property sets the parameters for freedom of contract, see Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471-74 (1923).

101. *Coppage*, 236 U.S. at 17.

102. For an analogous analysis of the law of rape, see MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *supra* note 22, at 649:

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation. Rape cases finding

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the hand was forcibly guided over the paper, or the gun held at the temple, to produce a signature. Physical force, in short, was the model, with other forms of coercion, such as the force of economic circumstances, going unrecognized.¹⁰³

2. *Duress as Substantive Unfairness*

The arbitrariness of the choices made by formalist duress doctrine, and particularly its exclusion of economic duress, made it exceptionally vulnerable to attack. As early as the 1920's, Hale noted that all contracting involves a measure of coercion, and that the advantaged person enjoys that position because the legal system has created entitlements for him.¹⁰⁴ This was not only an attack on "free will" as the paradigm of private contract, but was simultaneously an attack on the vaunted neutrality of the state as enforcer of the will of the parties.¹⁰⁵ Following Hale's line of reasoning, one would have to suppose instead that the state actually endorses the imposition of one party's will on the other.¹⁰⁶

Hale's extremely radical critique calls into question the entire structure

insufficient force reveal that acceptable sex, in the legal perspective, can entail a lot of force.

103. See *Coppage*, 236 U.S. at 15:

[I]n this case, the Kansas court of last resort has held that Coppage . . . is a criminal . . . simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employé at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed.

104. See, e.g., Hale, *supra* note 100, at 472:

The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner—consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided.

See also Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 612 (1943) ("[A]ll money is paid, and all contracts are made, to avert some kinds of threats.").

105. "What is the government doing when it 'protects a property right'? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents." Hale, *supra* note 100, at 471.

106. See Hale, *Bargaining, Duress, and Economic Liberty*, *supra* note 104, at 627-28:

Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others.

It is with these unequal rights that men bargain and exert pressure on one another. . . . There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract.

See also Mensch, *supra* note 11, at 28-29 (because ownership is product of legal entitlement, every bargain is function of legal system); Mensch, *supra* note 95, at 764 (same). Dawson, for example, pays tribute to "the complex issues of ethics and economic policy that constantly intrude themselves and on which courts, like other agencies of organized society, must take a positive stand." Dawson, *supra* note 35, at 289.

of a contract law that purports to be "private,"¹⁰⁷ but the critique's revolutionary potential has never been fully realized. Hale's themes were echoed by the Realists, but only to support change in areas where formalism's limited definition of coercion had come to seem inhumane and unrealistic. Employing Hale's insights, the Realists argued that the scope of the doctrine of duress could readily be expanded, and that the doctrine should reflect sensible policies plainly articulated rather than some metaphysical notion of "free will." The Realist message was, "If contract law is to be 'public,' let us be clear what public concerns are being met."¹⁰⁸

Hale's argument also provided the basis for Dawson's seminal article on economic duress. Dawson began by paying homage to the multiplicity of legal and equitable sources that had historically contributed to common law notions guiding duress and related doctrines.¹⁰⁹ But he also identified the increasing role that the concepts of free will and of will overborne played in these diverse strands of doctrine.¹¹⁰ Using Hale's critique as his starting point, Dawson discussed particular problems inherent in decisions about whether will is or is not free in particular circumstances.¹¹¹ But in shifting the emphasis away from the reality of assent, Dawson did not reformulate duress doctrine around the hitherto buried standard of bad behavior. Instead, he contested the law's traditional expressions of reluctance to judge equivalence in exchange; he argued both that equivalence could be measured and that courts had long successfully done so.¹¹²

Although Dawson wanted to make the substance of the bargain a central feature of duress doctrine, he was not prepared to confront directly the theory of "subjective value" so central to bargain theory. He argued that his suggestions did not "involve any expectation that the methods of private litigation will be used to overhaul the immense range of transactions involving the sale or exchange of goods and services in a competitive society."¹¹³ In order to ensure that such an overhaul would not occur, Dawson proposed limiting restitution to situations of impaired bargaining

107. See Mensch, *supra* note 95, at 764.

108. Thus, Hale writes:

We shall have governmental intervention anyway, even if unplanned, in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government. It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present.

Hale, *Bargaining, Duress, and Economic Liberty*, *supra* note 104, at 628; see also Dawson, *supra* note 35, at 289 ("The limited range of judicial action makes it no less important, however, that the issues raised in private litigation be correctly identified and placed in proper perspective.").

109. Dawson, *supra* note 35, at 254-62.

110. *Id.* at 256.

111. *Id.* at 257, 264, 266.

112. *Id.* at 277-82.

113. *Id.* at 290.

power: “[I]n the absence of specific countervailing factors of policy or administrative feasibility, restitution is required of any excessive gain that results, in a bargain transaction, from impaired bargaining power, whether the impairment consists of economic necessity, mental or physical disability, or a wide disparity in knowledge or experience.”¹¹⁴

Unfortunately, the introduction of the concept of impaired bargaining power ultimately committed Dawson to replicating the underlying structure of the formalist duress doctrine he sought to displace. The factual inquiry into impaired bargaining power depends upon distinguishing real from unreal assent, and acceptable from unacceptable behavior: “the specific conditions which affect the bargaining power and the motivations of individuals in particular transactions.”¹¹⁵ Because it provides neither improved access to party intent nor an improved basis for judging acceptable behavior, Dawson’s scheme leaves us where formalism did: We are unable to draw the line between freedom and coercion, either as a matter of logic or as a matter of policy.

One final piece of analysis brings us full circle. If the mere *fact* of impaired bargaining power, in combination with an inequivalence of exchange, were enough to invoke duress doctrine, impaired bargaining power would not serve the purpose Dawson acknowledges it still must: isolating just those kinds of impairment that the law is prepared to redress without feeling that the whole structure of bargaining between unequals is put in jeopardy. Dawson essentially recognizes this when he concludes that even in the face of impaired bargaining power and inequivalence, “factors of policy or administrative feasibility . . . may lead to refusal of judicial relief”¹¹⁶ At one level, this acknowledgement of the “public” nature of the assessment repairs the difficulty of subjectively assessing intent; but it implicates the decisionmaker all over again in the question of what the basis of the decision is to be. Thus, Dawson ultimately fails in his attempt either to explain or constrain the public intrusion of duress doctrine into the supposedly private world of contract.

3. *Modern Times*

The preceding examination of classical and Realist thinking on contract law reveals both a private and a public way of articulating the bases of duress. The private way is to say that what makes some bargains shocking is the way one party is manipulated into an assent that is not “real.” The public way is to say that some bargains are so shocking to our norms of

114. *Id.* at 289.

115. *Id.* at 282.

116. *Id.* at 290.

decency or equality that we will not enforce them. Classical theorists relied primarily on the private articulation; the Realists shifted the basic articulation of these doctrines to a public mode. In classical doctrine, however, private bumps into public: Doctrinal commitment to a market system based on the exploitation of inequality makes it impossible to judge as "unreal" the majority of coerced assents. Under the Realist view, public bumps into private: The conflict between subjective and objective value, between individualistic policies premised on inequality and dedicated to maintaining the basic market structure, and policies designed to minimize advantage and promote fairness in contractual relationship, can be resolved only by reintroducing a private analysis of assent. In both schemes, standards of good behavior are invoked as a mediating device, without an explicit recognition that they, too, are problematic in the absence of any defined way to sort out those situations requiring altruistic rather than individualistic conduct.

The central question guiding an analysis of current doctrine must therefore be whether it has moved forward in identifying either those public norms that must invalidate private contracts, or those instances in which private intention requires the protection provided by public intervention. I conclude that it has not. I plan to look, briefly, at two areas: the current law of duress and the comparatively new doctrine of unconscionability. My claim is that regardless of whether these doctrines present themselves as "more private" or "more public," they continue to wrestle with both the difficulty of ascertaining subjective intent, and the conflict among policy commitments to subjective and objective value, individualism and altruism.

a. *The Modern Law of Duress*

The *Second Restatement* provides, in three of its sections, a representative account of current formulations of duress doctrine. Section 174 is a vestige of the classical approach; it provides that assent obtained through physical constraint renders the resulting contract "void."¹¹⁷ The following two sections of the *Restatement* reflect the expanded conception of unfreedom which has been a part of the common law of duress since Hale's critique. The *Second Restatement's* attempt to define duress, however, is constrained by the three approaches we have already seen operating in earlier models: the assent of the disfavored party, the behavior of the favored party, and the terms of the exchange.

Section 175 adopts the first approach and focuses on assent; it makes voidable the contract to which a manifestation of assent has been induced

117. RESTATEMENT (SECOND), *supra* note 6, § 174 comment a.

by “an improper threat . . . [that] leaves the victim no reasonable alternative.”¹¹⁸ The commentary discusses what counts as “inducement”¹¹⁹ and what counts as a “reasonable alternative.”¹²⁰ Section 176 addresses coercive behavior; it defines what counts as an “improper threat.”

Predictably, Section 175 is bedeviled by the problem of knowledge. The commentary notes that the *Restatement* has chosen the “reasonable alternative” standard over other standards, including “such fear as precludes a party from exercising free will and judgment,” and such fear as “would induce assent on the part of a brave man or a man of ordinary firmness,” because of the “vagueness and impracticability” of the latter standards.¹²¹ In rejecting the latter two standards, the *Restatement* has rejected *both* a subjectively *and* an objectively conceived standard, as applied to the emotive (and, to that extent, overridingly subjective) concept of “fear.” In comparison to “fear,” “reasonable alternatives” has a reassuringly rational and objective ring. And yet the *Restatement* actually straddles the subjective-objective divide, both by coupling the objective “reasonable alternatives” with the subjective requirement that assent be induced by the threat,¹²² and then by its internal treatment of both reasonable alternatives and inducement.

The “objectivity” of the “reasonable alternatives” standard is supported by the commentary’s formulation of general rules. Defending a civil claim is “ordinarily” a reasonable alternative to succumbing to the pressure imposed by threat of a civil suit;¹²³ finding alternative sources of funds is, “absent a showing of peculiar necessity,” a reasonable alternative in face of a threat not to pay money owed.¹²⁴ On the other hand, the commentary partially subjectivizes the standard by requiring that the circumstances of the particular victim be considered.¹²⁵ The slide to subjectivity is halted only at the point where we might otherwise ask whether the victim himself perceived the alternative as reasonable.¹²⁶

118. *Id.* § 175(1).

119. *See id.* § 175 comment a.

120. *See id.* § 175 comment b.

121. *Id.*

122. *See id.* § 175 comment c: “A party’s manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress.”

123. *Id.* § 175 comment b.

124. *Id.*

125. *Id.*

126. For an example of the manipulability of the reasonable alternative standard in operation, see *Austin Instrument v. Loral Corp.*, 35 A.D.2d 387, 316 N.Y.S.2d 528 (App. Div. 1970), *rev’d in part, modified in part*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971). While the lower court found no duress, the appellate court found that duress was established as a matter of law, based in part on its assessment that reasonable alternatives had been pursued but were lacking. *See infra* note 128.

If the identification of reasonable alternatives proceeds as an objective exercise inevitably tainted by strong elements of subjectivity, then the identification of induced assent proceeds as a search for subjective states of mind inevitably guided by objective signposts. For instance, we are told that "although it is not essential that a reasonable person would have believed that the maker of the threat had the ability to execute it, this may be relevant in determining whether the threat actually induced assent."¹²⁷ These new and slippery criteria are no better than the standards rejected by the *Restatement* as vague and impractical. The interplay of subjective and objective creates a framework within which the decisionmaker can readily justify either finding or not finding a coerced assent in a given situation.¹²⁸

Because they run up against our conflicting ideas about what responsibilities we owe to one another in the contractual setting, the *Restatement's* definitions of improper threat are similarly underdetermined. The *Restatement* here incorporates both of the regulatory ideas already advanced in this context: a focus on the prohibition of some types of coercive behavior, and a focus on the equivalence of the resulting exchange. This explicit

127. RESTATEMENT (SECOND), *supra* note 6, § 175 comment c. According to the *Second Restatement*, "[T]he availability of disinterested advice and the length of time that elapses between the making of the threat and the assent may also be relevant in determining whether the threat actually induced the assent." *Id.* But for an illustration of the competing interpretations that may be put upon deliberation and the lapse of time, see *Austin Instrument*, 29 N.Y.2d at 131-32, 272 N.E.2d at 536, 324 N.Y.S.2d at 26-27.

128. For an example of the manipulability of these standards in operation, see *Austin Instrument v. Loral Corp.*, 35 A.D.2d 387, 316 N.Y.S.2d 528 (1970), *rev'd in part, modified in part*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

The plaintiff subcontractor, Austin, brought suit for a balance owing under its contract with the defendant, Loral. Loral in turn sued to recover damages for economic duress. At issue were some price increases made in the course of performance of the subcontracts, which Austin claimed were agreed upon, but which Loral argued were the product of coercion. The lower court found no duress, but the New York Court of Appeals found that duress was established as a matter of law.

Austin claimed to be working at a loss in its initial contract with Loral. It then demanded to be awarded a second subcontract and to be paid a higher price for its performance of the first subcontract, and threatened a work stoppage unless its demands were met. The month of the threatened stoppage was in any case a month in which Austin's work force traditionally took annual vacations. Loral responded to Austin in a letter which said that Loral had no alternative but to submit to the demands, because of the harm that might otherwise be done to Loral's relationship with its contracting party—the United States Navy.

The lower court emphasized that a threat to break a contract does not necessarily constitute duress. It stressed the tradition of renegotiation of prices in contracts of this type and declined to interpret Austin's threatened stoppage as a firm threat to discontinue performance. It found Loral's letter "self-serving," and questioned whether Loral's relationship with the Navy was threatened. It thought Loral's efforts to secure an alternative source of supply desultory, and concluded that Loral had reviewed its options "calmly and with considerable deliberation," and reached a voluntary decision to stay the course with Austin. *Austin Instrument*, 35 A.D.2d at 389-90, 316 N.Y.S.2d at 531.

The New York Court of Appeals, in contrast, saw the threatened stoppage as a firm threat. It took Loral's letter as a bona fide statement of its position. It thought Loral's fears of damaging its relationship with the Navy rational, and its efforts to secure an alternative supply adequate. See *Austin Instrument*, 29 N.Y.2d at 130-34, 272 N.E.2d 535-37, 32 N.Y.S.2d at 25-28. On precisely the same record as that before the lower court, therefore, the appeals court reached the opposite conclusion.

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reliance on standards of behavior is new to the *Restatement*, but its rise to prominence is not accompanied by any better account of how judges are to make individual determinations.

The *Restatement* divides threats into two categories: those so egregious as to be improper even without any analysis of the resulting bargain, and those offensive only when allied to a resultant unfair exchange.¹²⁹ The more egregious category is composed of conduct already defined as unacceptable by the criminal law or the law of torts, and conduct that breaches the contractual duty of good faith and fair dealing. Threats to commit crimes or torts do not necessarily influence the threatened party more than other threats not singled out for special treatment; Dawson had earlier lamented the “distinction between legal and illegal means” as “misdirected, a survival from an earlier period in which duress doctrines were merely an adjunct of the law of crime and tort.”¹³⁰ The only advantage of this strategy is that it displaces the problem of identifying unacceptable behavior over to some other area of the law, leaving the law of contract apparently free of the need for making such controversial normative choices.¹³¹

The problem with identifying conduct that breaches a contractual duty of good faith and fair dealing as the remaining category of egregious threat is that our doctrine has not developed reliable guidelines for distinguishing this unacceptable conduct from the kind of self-interested and self-reliant conduct on which the contractual system is based. Here the problem of normative choice is not displaced, only deferred until an individual judge is required to make an individual decision.

The less egregious category of threat is rendered problematic both by its dependence on the identification of the “unfair exchange,” and by its use of highly uncertain measures of appropriate conduct, such as “unfair dealing” or “the use of power for illegitimate ends.” These raise the very questions they were supposed to answer: What uses of power *are* illegitimate, what kinds of pressure *are* unfair, in the contractual context?

If duress is indeed a “public” limitation on freedom of contract, then, at

129. This is the distinction between threats grouped under § 176(1) and those grouped under § 176(2).

130. Dawson, *supra* note 35, at 287.

131. This is reminiscent of the following “economist joke.” An economist was on his hands and knees under a street lamp, evidently searching for something, when a policeman came by. He told the policeman he had lost his keys, and for some time they searched together. Finally, discouraged, the policeman asked: “Are you sure you lost them here?” “Why no,” replied the economist, “I lost them over there in that dark alley. But it’s easier to *look* here.”

one level, breach of societal norms is a perfectly legitimate basis for invoking the doctrine. Linking the presence of an improper threat to the subjective requirement of actual inducement can then be viewed as an appropriate way of limiting public intervention to protection of the private sphere of autonomy. In practice, however, apart from a somewhat arbitrary list provided by other areas of law, we have as much trouble identifying a breach of societal norms as we do identifying autonomy and its absence. Standards of appropriate behavior prove as elusive as standards of their exchange.

b. *Unconscionability*

In both the *U.C.C.*¹³² and the *Restatement*,¹³³ unconscionability doctrine is directed to the prevention of oppression and unfair surprise. In its focus on oppression, it has obvious and strong links to duress; in its focus on unfair surprise, it has similarly obvious and strong links to fraud. One way of explaining the place of unconscionability in the body of contract doctrine is to describe it as the public face of a concern for which duress and fraud then appear as the private expressions. An unconscionable contract is one that shocks the *public* conscience. Duress and fraud concentrate, by comparison, on the effect of the coercive or fraudulent conduct on the contractual capacity of the affected party. Another explanation is that unconscionability is the area in which the Realist insight about coercion is finally enshrined in contract doctrine, as the focus shifts from the model of bad behavior largely unconnected with the operation of the market system to the model of exploitation of economic advantage.

132. U.C.C. § 2-302 (1978) reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The principle of unconscionability is described as "one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *Id.* official comment 1 (citation omitted). The decision about whether a contract is tainted by unconscionability is to be kept from the unruly hands of the triers of fact; it is a question of law for the court. *Id.* § 2-302(1) and official comment 3. The latter reads, in part: "The present section is addressed to the court, and the decision is to be made by it. . . . Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts."

133. RESTATEMENT (SECOND), *supra* note 6, § 208 reads:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Here, too, the question is reserved to the court, although it is not specifically described as a matter of law rather than one of fact. *See id.* § 208 comment f.

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Unconscionability doctrine, however, contains the same tension between public and private, the same preoccupation with the problem of power, that we have already seen characterizes duress. As a result, rather than finally clarifying when the acceptable manipulation of economic advantage shades into unacceptable dealing, unconscionability doctrine reverts to the same endless play around reality of assent, standards of behavior, and inequivalence of exchange.

The newest idea in unconscionability doctrine is inequality of bargaining power. The *U.C.C.* version of unconscionability expressly disclaims any concern with this notion,¹³⁴ but the *Restatement* suggests that while “mere” inequality does not make for unconscionability, “gross” inequality does have a role to play.¹³⁵

Even gross inequality is not a conclusive indicator of unconscionability. It is to be used only in conjunction with “terms unreasonably favorable to the stronger party,”¹³⁶ an analysis that presumes the possibility of substantive measurement. As yet another qualification, the combination of gross inequality of bargaining power and unreasonably favorable terms will only lead to a finding of unconscionability if it demonstrates a failure of process rather than substance: “confirm[ing] indications that the transaction involved elements of deception or compulsion,” or alternatively demonstrates a lack of real assent, showing “that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”¹³⁷

This treatment of unequal bargaining power is paradigmatic of the uneasy way unconscionability doctrine brings together individualism and altruism, public and private. Inequality of bargaining power cannot of itself invalidate agreements, because the *Restatement* recognizes the truth of the Realist insight that every contract is the product of an inequality of bargaining power with respect to the subject of the bargain. The promise that we can correct for “gross” inequality is simply the promise that the worst features of the system can be held in check without threatening the regular operation of the system. The commentary suggests that we could agree on the point at which inequality becomes unacceptable, but it fails to offer any guidance for performing such a calculation. Diverting attention from the issue of equality to the presence or absence of other features of the agreement forestalls the overtly political decisions required to establish such a standard.

134. See U.C.C. § 2-302 official comment 1.

135. See RESTATEMENT (SECOND), *supra* note 6, § 208 comment d (“Weakness in the Bargaining Process”).

136. *Id.*

137. *Id.*

The commentary also directs our attention to the feature of substantive equivalence. It turns out, however, that this standard must be treated exactly the same way as inequality of bargaining power, and for exactly the same reasons. Mere inadequacy of consideration does not invalidate an exchange; only "gross disparity" is important.¹³⁸ And the suggestion that gross disparity must be linked to other features distracts us from the political nature of drawing lines between the grossly and the merely disparate—even while we are assured that the exercise *could* be undertaken.

In addition to inequality of bargaining power and inequivalence of terms, the *Restatement* provides only one further guide to recognizing unconscionability: the stronger party's state of mind. According to the *Restatement*, we should be influenced by:

belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests¹³⁹

This returns us to the behavior of the favored party, and does so in a fashion that is particularly problematic because of its emphasis on subjective standards. It seems that when we search for the objective manifestations of the culpable state of mind, we only return to the inquiries from which we have so recently fled.

D. *Summary*

In the implied contract story, we saw how public and private were confounded, how our understanding of implied-in-fact and express contracts requires us to draw on a fund of public information and values that influences our judgment of what we see. Similarly, our imposition of a public quasi-contractual obligation requires us to look for private signals from the parties about their conception of their relationship. Rather than banishing quasi-contract as a dangerous public exception to a private law of contract, therefore, we embraced its lesson that all contract is as public as it is private. This theme is elaborated in the discussion of manifestation and intent in Part II.

The lessons of duress and unconscionability are similar. The efforts to incorporate these doctrines into the world of private contract through a

138. *Id.* § 208 comment c. As with equality of bargaining power, there is no effort to suggest concretely how the line between mere and gross disparity might be drawn.

139. *Id.* § 208 comment d.

focus on contractual “will,” or to situate them as public exceptions to a rule that traditionally rejects interference in private exchanges, necessarily end in failure. Furthermore, the lessons of duress and unconscionability have the same direct bearing on consideration doctrine that the lessons of quasi-contract have on doctrines of contract formation and interpretation. These lessons reveal consideration doctrine to be as public as the doctrines of duress and unconscionability—as preoccupied with norms of fairness, as concerned to deny that preoccupation by recourse to identification of party will or intention. This theme is also taken up in the discussion of form and substance in Part III.

II. MANIFESTATION AND INTENT: COMMUNICATION IN THE LAW OF CONTRACT

Underlying the realms of contract doctrine concerning how agreements are formed, how they should be interpreted, and how contractual risks are allocated are models of how the parties communicate with one another and construct the meaning that is their contract, as well as models of how courts gain access to that meaning. In the previous section I suggested that it is not in practice possible to separate out a court’s understanding of the parties’ meaning from a meaning made for and imposed on the parties by the court. Here I elaborate on that theme, through an analysis of doctrinal categories including offer and acceptance, the parol evidence rule, disclosure, misunderstanding, and mistake.

My goal in this section is to articulate precisely how, according to contract doctrine, meaning is made and communicated. I suggest that close examination reveals the doctrinal model to be at once unconvincing and incomplete. To the extent judges attempt to describe communication in doctrinal terms, they are forced into accounts that tend to distort what we imagine the actual process of communication between the contracting parties to have been. To the extent the doctrinal model leaves judges without guidance, they are left ascribing meaning according to unarticulated criteria. Both these problems emphasize the gap between the contract as the parties may have understood it and the contract as ultimately described by the court.

At the root of these difficulties lies the problem of knowledge—the gulf between self and other, subject and object. Translated into doctrinal discourse, this becomes the distinction between subjectivity, substance, and intent on one hand, and objectivity, form, and manifestation on the other. Our legal culture appreciates the difference between what someone subjectively intends, and the form in which he makes that intention available to others (the objective representation of his thought or wish). That we

concede the possibility of "mis-understanding" demonstrates our awareness of this dichotomy and our recognition that the signs can be read to manifest something other than the "actual" or "real" intent of their author. Appreciating the difference, our legal culture has explicitly opted to favor objective over subjective, form over substance, and manifestation over intent, in the areas of doctrine with which this Part deals. Yet the suppressed subjective constantly erupts to threaten the priority accorded the objective, is subdued, and erupts again. The details of this dynamic occupy the following pages.

Doctrinal obsession with the competing claims of objective and subjective, manifestation and intent, dates perhaps from the time at which a "will theory" of contract, initially conceived as emphasizing the subjective "meeting of the minds,"¹⁴⁰ was "objectivized" by the likes of Holmes and Williston.¹⁴¹ In this second incarnation, while the subjective intentions of the parties were still felt to provide the legitimating basis of contractual obligation, the measure of intention became overwhelmingly objective. The tension between these two aspects of doctrine and the need to reconcile them did not become urgent until a couple of decades into the twentieth century.¹⁴²

The *Second Restatement* provides an up-to-the-minute account of how that tension is managed today. We see that objectivity is still accorded an initial priority. Take, for example, the *Restatement's* formulation of "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."¹⁴³ Here the *Second Restatement* directs us to focus, not on all intentions, but only on manifested ones. The commentary elaborates on the significance of this distinction: "The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention."¹⁴⁴ At first glance, this constrained notion of intent seems pragmatic. To base contract interpretation on undisclosed intention is surely to invite chaos, perjury, a whole catalog of evils. At a more theoretical level, we might also imagine a concern with undisclosed intention to be senseless. At some point the undisclosed must be disclosed or we can have no concrete knowledge of it. Intent, in this view, is wholly dependent on manifestation—the only questions left are:

140. See KESSLER & GILMORE, *supra* note 8, at 35-38.

141. G. GILMORE, *supra* note 29, at 41-44; see *infra* notes 152-57 and accompanying text.

142. See, e.g., Costigan, *supra* note 61; Whittier, *supra* note 63, at 442-44.

143. RESTATEMENT (SECOND), *supra* note 6, § 2(1).

144. *Id.* § 2(1) comment b.

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What count as manifestations? To whom must they be made? In what form? At what time?

But even while objectivity retains its priority, subjectivity is accorded a vital and subversive supplementary role. According to the *Restatement* scheme, recognizing a manifestation requires a knowledge of intent. The *Restatement* demands that we categorize manifestations: Only manifestations of *intent* qualify as promises,¹⁴⁵ only manifestations of *assent* qualify as assent.¹⁴⁶ Doctrinally we cannot, it turns out, sort or interpret manifestations without reference to an intent we have already acknowledged to be beyond our grasp save through the graspable reality of manifestations that we cannot comprehend without recourse to an unknowable intent . . . and so on.

In the various doctrinal areas rendered problematic by this basic conundrum, the *Restatement* attempts three different, although related, solutions. One proposed escape route treats “intent,” in the formulation “manifestation of intent,” as mere verbiage, not as an indication that the decisionmaker in fact needs to take account of intent.¹⁴⁷ A second route suggests that in concrete disputes the problem of recognizing manifestations is reduced to the problem of choosing between two competing sets of manifestations, so that the adoption of a formal hierarchy that privileges certain classes of manifestations will provide criteria of choice not dependent on intent.¹⁴⁸ It is clear how these two devices can work together: Having dismissed the idea of “actual” intent from the rule formulation, the formal hierarchy purports to provide the substitute criteria. The third proposed escape route attempts to resolve the set of “communication” problems by reference to a standard of “responsibility,” as a substitute for reliance on “manifestations of intent.”¹⁴⁹

Just as the basic conundrum is unresolvable, so the proposed escape routes turn out to be dead ends. All three routes lead to endless struggle with the unknowability of intent on the one hand, and the legitimation problems involved in the use of non-consensual or non-intent-based criteria on the other. Each leads to a choice between basing liability on an unreliable assertion of private intention, or admitting and justifying the imposition of public law on the parties. I shall demonstrate how this dynamic operates to ensure that: (1) any standard that begins by emphasizing intention winds up depending on equally unsatisfying models of formal hierarchy or responsibility; (2) any standard that begins by

145. *Id.* § 2(1).

146. *Id.* § 18.

147. See the account of the objective theory of contract which follows at text accompanying notes 149–173.

148. See the account of formal hierarchy which follows at text accompanying notes 174–213.

149. See the account of responsibility which follows at text accompanying notes 214–270.

emphasizing formal hierarchy winds up depending on equally unsatisfying models of intention or responsibility; and (3) any standard that begins by emphasizing responsibility winds up depending on equally unsatisfying models of formal hierarchy or intention.

A. *Intention Ousted: The Objective Theory of Contract*

A standard history of contract doctrine represents that, from the sixteenth to the early nineteenth century, contract formation depended upon a subjective "meeting of the minds."¹⁵⁰ Despite the accordance of this subjective theory with the nineteenth-century "will theory" of contract, by the middle of the nineteenth century "the tide had turned in favor of an objective theory of contract."¹⁵¹ To see the sequence as one in which objectivism replaced subjectivism is to discount the crucial, although supplementary, role that subjective will as a *source* of obligation continued to play. But the story accurately portrays the increased insistence on objectivity as an interpretive standard.

Holmes' article, *The Theory of Legal Interpretation*, illustrates the fundamental challenge of objectivism to the subjective theory it came to overshadow.¹⁵² According to Holmes, the "intent" of the parties was never the issue in any case of contract interpretation. To determine the meaning of a word used in a contractual situation, Holmes believed the first step should be to consider its meaning in the context of surrounding words. But this was an exercise in applying the "general usages of speech" and did not reflect any concern with the "idiosyncrasies of the writer."¹⁵³ Admitting evidence of circumstances, and reading a contractual document in light of them, was also not about divining the intent of the parties. We were to ask instead, Holmes suggested, what the words used by the speaker would mean "in the mouth of a normal speaker of English, using them in the circumstances in which they were used."¹⁵⁴ In the case where the speaker uses a proper name that could refer to more than one person

150. See Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 943-45 (1967). This subjective theory of formation was firmly established by the end of the eighteenth century. See, e.g., *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818), reprinted in KESSLER & GILMORE, *supra* note 8, at 268; *Cooke v. Oxley*, 100 Eng. Rep. 785 (K.B. 1790), reprinted in KESSLER & GILMORE, *supra* note 8, at 239; Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368 (1921).

151. Farnsworth, *supra* note 150, at 945. Gilmore stresses the extent to which residual reliance on the subjective "meeting of the minds" standard continued to characterize such later cases as *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864), reprinted in KESSLER & GILMORE, *supra* note 8, at 709, and *Dickinson v. Dodds*, 2 Ch. D. 463 (Ch. Div'l Ct. 1876), reprinted in KESSLER & GILMORE, *supra* note 8, at 240. G. GILMORE, *supra* note 29, at 35-44.

152. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

153. *Id.* at 417.

154. *Id.* at 417-18.

or thing (because there are, for example, two Blackacres or ships Peerless),¹⁵⁵ Holmes saw the inquiry into circumstance revealing which of two different *words* the speaker used, rather than revealing the speaker's intention.¹⁵⁶

Mainstream twentieth-century thinkers came to accept the most extreme manifestations of the Holmesian doctrine. "It is even conceivable," Williston observes, "that a contract may be formed which is in accordance with the intention of neither party."¹⁵⁷ Learned Hand puts it more vividly when he suggests:

A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held [to the usual meaning]¹⁵⁸

This analysis forces us to ask what justifies the departure from intent. The central argument advanced is that replacing the unknowable and possibly idiosyncratic intentions of the contracting party with "that stubborn anti-subjectivist, the 'reasonable man,'"¹⁵⁹ is an advance. It seems insufficient to suggest that this substitution merely satisfies an aesthetic impulse.¹⁶⁰ At one level the substitution can be seen as a shift to a "responsibility" model: You are responsible for what you would appear to the reasonable man to be saying, rather than for what you actually meant to say. In this sense the standard seems tortious rather than contractual, even

155. See *Raffles*, 159 Eng. Rep. 375.

156. See Holmes, *supra* note 152, at 417–18. As Gilmore comments, "The magician who could 'objectify' *Raffles v. Wichelhaus* . . . could, the need arising, objectify anything. But why bother?" G. GILMORE, *supra* note 29, at 41.

157. 1 S. WILLISTON, LAW OF CONTRACTS § 95 (3d ed. 1957), reprinted in KESSLER & GILMORE, *supra* note 8, at 707.

158. *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913), reprinted in KESSLER & GILMORE, *supra* note 8, at 707.

By making bishops his oracles, Hand has fudged the issue of how they would show that their divination of intent was the correct one; if they were mere humans with no special access to higher authority, we might imagine that they too would have to rely on manifestations. This would change the nature of the exercise from a simple privileging of manifestation (and disregard for intent) to an exercise in which certain manifestations were given priority over others by a standard other than that of intent. The parol evidence rule is a perfect example of this. Williston's objectivism turns out to have very specific implications for the application of that rule, but they are implications that depend not just on the privileging of manifestation over intent, but also the privileging of some manifestations over others. See *infra* text accompanying notes 182–206 (treatment of parol evidence rule).

159. *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring). Judge Frank's concurrence is excerpted in KESSLER & GILMORE, *supra* note 8, at 707.

160. "[I]n part at least, advocacy of the 'objective' standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses." *Ricketts*, 153 F.2d at 761 (Frank, J., concurring) (citation omitted).

as "reliance" strikes us as a tortious notion. But at another level it can be reconciled with intention and the contractual model. If the reasonable man is a businessman assessing the words and conduct of businessmen, then in most instances appearance and reality will converge. Alternatively, if the ranking of manifestations is seen as a tool available to businessmen in their contract planning, they will be sure to shape in the proper legal form the deal they intended to make.¹⁶¹

It seems fair to say that the credibility of these arguments depends on two things: First, on the extent to which we can believe in the "reasonable man," as represented by his interpreters, the jurors and trial judges. As Frank puts it:

[W]e must recognize, unless we wish to fool ourselves, that although one area of subjectivity has been conquered, another remains unsubdued. . . . We ask judges or juries to discover that "objective viewpoint"—through their own subjective processes. Being but human, their beliefs cannot be objectified, in the sense of being standardized.¹⁶²

Second, the credibility of these arguments depends on our valuing objectivity and stability (to the extent we think the rule does or can promote them) more than we value the effort at divining "real" intention, in situations where the intention appears from the evidence to have been understood by both parties, but is different from the intention objectively constructed. It is this latter concern, more than anything else, that appears to have evoked the conviction that the objectivists went "too far."¹⁶³

Hayden v. Hoadley,¹⁶⁴ decided in 1920, is an example of an objectivist position that seems extreme by today's standards. The parties exchanged property through a written agreement that bound Hoadley and his co-seller to make certain repairs on the property conveyed to the Haydens.¹⁶⁵ Nothing in the agreement spoke to the timing of the repairs, the amount to be expended, or the quality of materials to be used. The trial court excluded evidence of oral agreement as to these matters in a decision upheld by the Supreme Court of Vermont.¹⁶⁶

161. These arguments suggest, first, that for *most* people there is no coercion in imposing an external standard on their behavior, since that standard is one they have already internalized and, second, that even when the external standard has not already been internalized, it can be, without notable cost, and indeed with advantage. The first argument assumes that law follows fact, the second that fact follows law.

162. *Zell v. American Seating Co.*, 138 F.2d 641, 647 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) (per curiam), reprinted in *KESSLER & GILMORE, supra* note 8, at 679.

163. *Ricketts*, 153 F.2d at 761 (Frank, J., concurring).

164. 94 Vt. 345, 111 A. 343 (1920).

165. *Id.* at 347-48, 111 A. at 344.

166. *Id.* at 348, 111 A. at 344.

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Justice Powers, for the court, began his analysis with an unexceptional statement of the parol evidence rule: “A written contract which contains no latent ambiguity cannot be qualified, controlled, contradicted, enlarged, or diminished by any contemporaneous or antecedent understanding or agreement”¹⁶⁷

In Powers’ view, however, the rule governs not merely the express terms of the contract, but also its “legal intendment.”¹⁶⁸ This view severely erodes the role of the parties’ intentions. In the absence of any express provision as to the timing of the repairs, for example, the law would imply a requirement that they be completed within a reasonable time.¹⁶⁹ Because any oral supplementary term as to timing would contradict the “reasonable time” provision, it may not be included: “To admit the testimony offered by the defendants to the effect that the parties agreed upon October 1 as the limit of the time given for the repairs would be to allow the plain legal effect of the written contract to be controlled by oral evidence. That is not permissible.”¹⁷⁰

While Justice Powers is firm in asserting the “unquestioned soundness” of the rule that “an incomplete writing may be supplemented by parol,”¹⁷¹ his conclusion that this contract is “unequivocal and complete”¹⁷² makes clear that the exception is to be narrowly construed.¹⁷³ Powers, like Holmes and Williston, disregards the particular parties and their intentions in the name of a “legal intendment,” the justification for which is apparently so obvious to the author that it goes virtually unarticulated.¹⁷⁴

167. *Id.*, 111 A. at 344–45.

168. *Id.*, 111 A. at 345.

169. *Id.*

170. *Id.* (citation omitted).

171. *Id.* at 349, 111 A. at 345.

172. *Id.* at 348, 111 A. at 345.

173. Justice Powers’ fervor for the rule is further demonstrated by his refusal to consider the evidence as demonstrating what time would be reasonable under the circumstances, because the parties had not offered it on that basis, *id.* at 349, 111 A. at 345, and his *assumption* that the oral conversations referred to took place before the written contract was executed, despite the silence of the record on that point, *id.*

174. Powers does stress the primacy of the “rule,” *id.* at 348, 111 A. at 344, as well as the fact that it would be “illogical and wrong” to decide otherwise, *id.* at 348, 111 A. at 345.

A nice counterpoint is provided by *Garden Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 189 A.2d 448 (N.J. Super. Ct. App. Div. 1963):

[E]xperience teaches that language is so poor an instrument for communication or expression of intent that ordinarily all surrounding circumstances and conditions must be examined before there is any trustworthy assurance of derivation of contractual intent, even by reasonable judges of ordinary intelligence, from any given set of words which the parties have committed to paper as their contract.

Id. at 496, 189 A.2d at 454. The judge justifies the fullest consideration of “surrounding and antecedent circumstances and negotiations.” *Id.* If “intent” has thus been raised to primacy, however, the necessity for a residual commitment to “manifestation” finds expression in the limitation—exactly

B. *Formal Hierarchy: Manifestations Multiplied*

In the cut and thrust of contract disputes, we imagine the abstract, open-ended problem of finding manifested-intent reduced to the concrete restricted choice between the different versions that the two contracting parties urged upon the decision-maker. This gives credibility to a formal model of determining contractual content: Some manifestations simply take precedence over other manifestations, so that conflicts of interpretation can be resolved by favoring the hierarchically superior manifestation. Thus, as I explore below, speech is superior to silence, while final writings are superior to earlier writings or speech.

Current contract doctrine, as reflected by the *Second Restatement*, reacts to the perceived excesses of objectivism by consistently invoking intent as the ultimate justifier of hierarchy. In general terms, the justification is that hierarchy reflects intention because intention corresponds to hierarchy. This general statement, however, hides the existence of two quite separate themes: Intention may correspond to hierarchy because the rules carefully mirror what people ignorant of the rules intend, or because people take account of the legal rules in expressing their intentions. While these two accounts contain dramatically different visions of the relationship between law and life, judges cheerfully adopt one or the other as it suits their purpose. They may even adopt both at once, which leads to entirely circular reasoning.¹⁷⁵

The re-connection of formal hierarchy with intention, in whatever form, serves to subdue the argument that rules that arbitrarily accord priority to some manifestations of intention take contract doctrine too far from party intention and voluntary obligation. But modern doctrine must still wrestle with the problem created by convincing evidence that the interpretation yielded by the formal hierarchy is not the "real" interpretation. If the hierarchy triumphs, then the question reemerges of what—if not intent—legitimizes it; if the hierarchy does not triumph, then its value as a constraint on decision-making is undercut.

I examine how this dynamic plays itself out in three examples. An analysis of *Restatement* section 203, "Standards of Preference in Interpretation," yields a crude understanding of the difficult relationship between formal hierarchy and intention. My second example is the parol evidence

converse to Powers' statement of the exception to *his* version of the rule—that the court's interpretation must be "one 'which the written words will bear.'" *Id.* at 497, 189 A.2d at 455 (quoting *Deerhurst Estates v. Meadow Homes, Inc.*, 64 N.J. Super. 134, 149, 165 A.2d 543, 551 (N.J. Super. Ct. App. Div. 1960)).

175. I have already identified the first version as a "fact leading law" argument, and the second as a "law leading fact" argument. See *supra* note 161. For an illustration of the two themes conflated to provide a perfectly circular argument, see Baron Alderson's opinion in *Hadley v. Baxendale*, 9 Ex. 341, 355, 156 Eng. Rep. 145, 151 (1854), reprinted in *KESSLER & GILMORE, supra* note 8, at 1023.

rule, where final writings take precedence over other evidence, most commonly earlier speech. The *Restatement* treatment of the rule provides an elaborated statement and attempted resolution of the same problem, introducing the way in which a second level of doctrinal play between form and substance can mediate the primary tension between hierarchy and intention. My final example is the group of rules about silence as assent, where speech or writing takes precedence over silence. This last analysis presents the way in which the paradigm of responsibility can play a mediating role, a subject that I then pursue in more detail in the areas of misunderstanding, disclosure, and mistake.

1. *Standards of Preference in Interpretation*

Restatement section 203 is an elaborate, painstaking, and thorough attempt to create a formal hierarchy of manifestations. It is a miracle of orderly privileging: Whole interpretations win over partial, and specific terms over general; relevant categories of interpretive context are identified and ranked.¹⁷⁶ Unfortunately, however, the commentary undermines whatever sense of order and security the text conveys.

According to comment a, “The rules of this Section are applicable to all manifestations of intention and all transactions. They apply only in choosing among reasonable interpretations. *They do not override evidence of the meaning of the parties, but aid in determining meaning or prescribe legal effect when meaning is in doubt.*”¹⁷⁷ The first two sentences of the comment confirm our sense of what the section is about: It allows us to choose between and among possible meanings. It provides the way to sort conflicting evidence of the content of the parties’ agreement. Then the comment proceeds to contradict itself, and negate the text of the section: The formal hierarchy may not be employed to “override evidence of the meaning of the parties.”¹⁷⁸ But the hierarchy was supposed to *produce* the meaning of the parties. The rules of the hierarchy were applicable to “all

176. Section 203 reads:

In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:

- (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
- (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade;
- (c) specific terms and exact terms are given greater weight than general language;
- (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.

RESTATEMENT (SECOND), *supra* note 6, § 203.

177. *Id.* § 203 comment a (emphasis added).

178. *Id.*

manifestations of intention,"¹⁷⁹ which are our only sources of intention. If the meaning they produce is now open to challenge, how are we to derive the alternative meanings that might challenge it, and by what criteria are we to assess the success of the challenge?

At one level we appreciate the realistic "flexibility" in ascertaining meaning that the section and comment combine to give us: It accords with our sense that the formal hierarchy is not sufficient to explain how judges derive meaning when they decide cases. The structure of section 203 deceives us, however: The text of the section stands as an affirmation of formal hierarchy, while the comment does not spell out the full extent of its undermining function. We are not told what the real story of section 203 demands we be told: "The formal hierarchy is a reliable guide to what manifestations should count, except when it isn't. It can be trumped by other evidence of the parties' meaning." What other evidence? When? No answers are forthcoming.¹⁸⁰

Underlying the undermining language of the comment is the concern that manifestations, after all, are empty unless they signify intent, and that without some such qualification the "real" intent will lurk in the wings to delegitimize the device of formal hierarchy. At one level the fear is a groundless one: All intent requires manifestation to be known, while all manifestations are threatened by irrelevance without reference to the intent they signify. If the text of section 203 were truly to limit the scope of our inquiry, it would inhibit us from *finding* other evidence of the "meaning of the parties."¹⁸¹ It would not, of course, protect us from doubts and fears that we had looked at empty vessels and missed the boat. These same doubts and fears are what have guided the interpretation and application of the parol evidence rule in its development from the classical period to the present.

2. *The Parol Evidence Rule*

The thrust of the parol evidence rule is that an "integrated" writing,¹⁸² or one that contains the "final expression"¹⁸³ of the parties with respect to any terms of their agreement, cannot be contradicted or even supplemented with respect to those terms by other writings, speech, or conduct of the parties.¹⁸⁴ While the most frequent issue in application of the rule is

179. *Id.*

180. *Cf. id.* § 154, which, in the area of mistake, provides just such a candid expression of the limitations of the rule formulated. *See infra* text accompanying notes 262-271.

181. *Id.* § 203 comment a.

182. *See id.* § 209.

183. *See id.*

184. *See, e.g., id.* §§ 215-216.

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perhaps the priority of later writing over earlier speech, the priority is more accurately that of final writing over other types of evidence. The very use of the adjective “final” suggests that the hierarchy is at the same time based on intention, that it applies where the parties see the writing as their “last word” on the subject.

The standard story about the parol evidence rule is that, while designed to prevent fraud and introduce stability by permitting businessmen to record their transactions, it has a disturbing tendency to promote fraud by allowing one party to limit a liability which attention to all evidence of agreement would indicate is more substantial than the integrated writing alone reflects. The standard story, told in a tone of exasperation, is that efforts to prevent fraud both by exaltation of the final writing and by subversion of the final writing necessarily make the rule one riddled with exceptions, virtually incapable of being applied.¹⁸⁵

We should begin our examination of the rule with a quick survey of the principal ways in which evidence external to the writing is admissible. Since the writing does not announce its finality or its scope, external evidence is needed on the question of whether and to what extent the writing is integrated.¹⁸⁶ In addition to these qualifications, the final writing does not interpret itself, so reference to evidence external to the writing is required for interpretation.¹⁸⁷ Finally, the writing cannot be conclusive as to its legitimacy, so evidence can be admitted to show mistake, fraud, duress, lack of consideration, or the existence of a condition precedent.¹⁸⁸

This tedious taxonomy demonstrates how a rule that purports to be about the privileging of “final writings” turns out to be surrounded by rules that reverse the privilege, so that prior evidence of a condition can supersede the written testament of the agreement, or so that prior evidence of trade usage can supersede the dictionary meaning of the written terms.¹⁸⁹ It is important to realize, however, that the precise formulation

185. *E.g.*, Corbin, *The Parol Evidence Rule*, 53 *YALE L.J.* 603, 609–10 (1944).

186. On the use of external evidence to show that a writing is integrated, see *RESTATEMENT (SECOND)*, *supra* note 6, § 209 comment c. Such evidence is inadmissible even when the writing purports to announce its integrated nature: “Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive.” *Id.* § 209 comment b. On the use of external evidence to show whether the writing is a complete or only a partial integration, and whether collateral agreements exist, see *id.* § 210. “[A] writing cannot of itself prove its own completeness” *Id.* § 210 comment b.

187. *Id.* § 212. As § 212 comment b explains, “[M]eaning can almost never be plain except in a context.”

188. *Id.* §§ 214, 217. Section 214 provides that “evidence of prior or contemporaneous agreements and negotiations” is available for the purpose of establishing “illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause.” Section 217 excludes orally agreed-upon conditions to a written agreement from the ambit of the integrated agreement.

189. *Cf.* *Hurst v. Lake & Co.*, 141 Or. 306, 315, 16 P.2d 627, 630 (1932), reprinted in *KESSLER & GILMORE*, *supra* note 8, at 673 (evidence of custom should not be excluded, even though instrument is nonambiguous on its face).

of the rule with its exceptions represents a second-level effort to sustain the very hierarchy that has, at the first level, proved unsatisfactory.

The first sustaining device, exactly analogous to the relationship between the text and the comment of section 203,¹⁹⁰ is a reversion to the idea of intent. When the formal hierarchy seems insupportable, intent is reintroduced in an attempt to legitimate it. This occurs, for example, when the *Restatement* talks about proving an integration,¹⁹¹ proving a complete integration,¹⁹² and distinguishing an integrated from a completely integrated agreement.¹⁹³

It is easy to state the anxiety that underlies the reintroduction of intent in this subversion of formal hierarchy. To call an agreement integrated purely because of its length, complexity, or apparent completeness, seems an arbitrary statement of judicial or legal preference. To call it integrated because most people who write such agreements intend them to be final statements, allows the unscrupulous to exploit some particular people with a definition drawn from the abstract "most people." Interpreting such contracts according to their dictionary meaning is a similarly arbitrary exercise of authority with similar potential for exploitation. Yet, inexorably, the reintroduction of intent undercuts the hierarchy of form without yielding firm guidelines for deciding cases.

Having created this subjective threat to the rule's objective hierarchy, the *Restatement* then shores up the rule by recreating formal hierarchy at a second, "softer" level. Where the first level of formal hierarchy directly ranked the expressions of the parties—privileging writings over words or conduct—this second level works more indirectly through three devices we could loosely call procedural: (1) using *presumptions* that favor certain manifestations over others, while avoiding any absolute privileging; (2) ordering the different tasks that constitute application of the parol evidence rule, so that evidence may be included in one stage of the proceedings but legitimately excluded in another; and (3) dividing issues of proof between law and fact, judge and jury, in a fashion that diverts attention from the evidence-to-be-considered to the identity of the decisionmaker.¹⁹⁴

190. See *supra* text accompanying notes 176–181.

191. "Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence." *RESTATEMENT (SECOND)*, *supra* note 6, § 209 comment c.

192. "[W]ide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." *Id.* § 210 comment b.

193. "Writings do not prove themselves; ordinarily, if there is dispute, there must be testimony that there was a signature or other manifestation of assent." *Id.* § 214 comment a.

194. Ironically enough, this increased reliance on procedural devices is allied, as already suggested, with an increased concern for the protection of party intent. It further corresponds with what is commonly described as a shift from viewing the parol evidence rule as a "rule of evidence" to viewing it as a "rule of substantive law."

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Let me first illustrate the use of presumptions. While the apparently integrated agreement does not necessarily qualify as an integrated agreement, it is presumed to be integrated.¹⁹⁵ In interpreting an integrated agreement, the written words, while not the only admissible evidence of the parties' meaning, are given a similar procedural priority.¹⁹⁶ Any apparent reassurance provided by the "weighting" technique evaporates once you ask what *other* evidence would establish that a writing was not integrated, or what *other* evidence of the transaction could override the apparent meaning of the written words of the agreement.

The next device is that of sequencing. In the context of the parol evidence rule, the *Restatement* suggests that the first decisions must be whether the writing is an integration,¹⁹⁷ and if so, whether it is a complete or only a partial integration.¹⁹⁸ The next decisions are whether the agreement reflected by the writing is affected by an invalidating cause and, provided it is not, how it should be interpreted.¹⁹⁹ Only a written agreement duly identified, validated, and interpreted "renders inoperative prior written agreements as well as prior oral agreements."²⁰⁰

The message of this task management scheme appears to be that the decisionmaker need not be swamped by the boundless context of the agreement. Although the privileged position of the final writing in the hierarchy of interpretive sources has not completely isolated the writing from the context of the agreement, the specificity and temporal spacing of the questions posed can limit the impact of that context on interpretation. No matter that each preliminary question requires the decisionmaker to consider "all relevant evidence, including the circumstances in which the writing was made or adopted."²⁰¹ We have still "managed" the context and, most critically, have prevented it from completely undermining the sanctity of the integrated agreement.

The final re-creation of hierarchy is achieved by the division of issues between judge and jury. Unlike other areas of law, there is no clear link, in this context, between judge and law, jury and fact; the *Restatement* is quite clear that some of the issues reserved for the judge are nonetheless issues of fact. For example, the question of whether there is an integrated

195. RESTATEMENT (SECOND), *supra* note 6, § 209(3) provides that the apparently complete writing "is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression."

196. "[A]fter the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." *Id.* § 212 comment b.

197. *Id.* § 209.

198. *Id.* § 210.

199. *Id.* §§ 212-218.

200. *Id.* § 213 comment a.

201. *Id.* § 214 comment a.

agreement "is to be determined by the court,"²⁰² even though it is "a question of fact to be determined in accordance with all relevant evidence."²⁰³ Interpretive questions with respect to an integrated agreement are to be decided as questions of law, unless they depend on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, in which case they go to the "trier of fact."²⁰⁴

There are at least two messages of reassurance here. The first is that while in some cases application of the parol evidence rule requires an expanded and complex inquiry into circumstance, there are still easy cases. For example, the claim of section 212(2) that some writings can be interpreted without reference to any evidence extrinsic to the document comes close to being a reincarnation of the "plain meaning" rule so explicitly abandoned by the *Restatement* elsewhere. Section 212(2) perpetuates the idea of the writing being independent, in at least some instances: It avoids the recognition that the writing is truly never self-limiting.²⁰⁵

The second message of reassurance is that the task of implementing the rule as a rule about party intention need not devolve into idiosyncratic instability. In this story the jury becomes the scapegoat. While unruly fact-finders, constantly tempted "to exercise a dispensing power in the guise of a finding of fact,"²⁰⁶ need the constraining influence of the hierarchy, we can trust our judges reliably and objectively to weigh all the evidence of party intention. We are asked to transfer our faith from the objectivity of the written document to the objectivity of the decisionmaker. Facts are made law-like, stable, not manipulable; indeed, facts recover the characteristics the objectivists imbued them with when they held the final writing to be the only source of evidence.

But this story diverts us from the real lesson of these provisions. The unruliness of the inquiry does not arise from the level of objectivity, discipline, or good faith exercised by the decisionmaker. Rather, it is the result of our inability to identify intention in any reliable way, and our equal incapacity to live with a rule structure that resolutely disregards intention. Instead of openly acknowledging this difficulty, the *Restatement* presents us with a system that turns irresolutely between the poles as it pretends to provide a determinate guide to decisionmaking.

202. *Id.* §§ 209(2), 210(3).

203. *Id.* § 209 comment c.

204. *Id.* § 212(2). The commentary elaborates that this reservation of interpretive authority to the judge "has the effect of limiting the power of the trier of fact to exercise a dispensing power in the guise of a finding of fact, and thus contributes to the stability and predictability of contractual relations." *Id.* § 212 comment d.

205. See also *Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 189 A.2d 448 (1963).

206. RESTATEMENT (SECOND), *supra* note 6, § 212 comment d; see also *supra* note 193 and accompanying text (discussing *Restatement's* conception of proof needed to validate a writing).

3. *Silence as Assent*

Just as the parol evidence rule sought to privilege the “final writing” as evidence of agreement, so the rules about when silence can function as assent create a hierarchy that delegitimizes silence. As with the parol evidence rule, however, the attempt to invoke this formal hierarchy fails, forcing doctrine either back into the rhetoric of intent or into another mediating rhetoric—in this case, that of responsibility. Since the hierarchy was initially invoked to rescue decisionmakers from the problems of intent, the reversion to intent is plainly unsatisfactory. The parallel problems with responsibility are the subject of the next section. The particular force of this analysis, therefore, is the way in which it shows the rhetorics of intent and responsibility working together to shore up a frail appeal to formal hierarchy.

Restatement section 19 provides that a manifestation of assent may take the form of written or spoken words, or of acts or failures to act.²⁰⁷ Failing to act, however, is an underprivileged form of conduct, since silence and inaction are *generally* disqualified as manifestations of assent.²⁰⁸ If absolute, the rule would appear to solve a (perhaps limited) set of assent puzzles in a purely “formal” way, but without any pretense that intent was the crucial criterion; some other “public” justification would have to be invoked for such a rule.²⁰⁹ The disqualifying presumption is a qualified effort in the same direction.

The question now is how we apply the rule, how we recognize the “exceptional”²¹⁰ case where silence may be assent. According to the *Restatement*, there are in fact two classes of exceptional cases: “those where the offeree silently takes offered benefits, and those where one party relies on the other party’s manifestation of intention that silence may operate as acceptance.”²¹¹ The first type of case shifts us from “contract proper” into “restitution,” and introduces the theme of unjust enrichment.²¹² But, as it

207. RESTATEMENT (SECOND), *supra* note 6, § 19.

208. *Id.* § 69. Section 69(1) provides that “[w]here an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only.” Section 69(1) comment a confirms that “[a]cceptance by silence is exceptional.”

209. The same is true of the “plain meaning” rule classically used to prohibit the use of external evidence in interpreting the integrated agreement unless the contractual language was ambiguous. Under that rule, an unambiguous dictionary definition could replace the actual significance intended by the parties.

210. *Id.* § 69 comment a.

211. *Id.*

212. It is worth noting the way in which the language “silently takes offered benefits” jars with the category “silence and inaction” of which it is supposed to be an example. Inaction here has been transmuted into “action” on the basis of a judgment that the offeree has “benefited.” The instability of the terms is thereby illuminated. This is an illustration of the maxim that could be said to haunt this whole discussion: Action, and sometimes inaction, speaks louder than words.

turns out, the enrichment is defined as unjust according to models of intent and responsibility: The offeree must have a "*reasonable opportunity*" to reject the services, and "*reason to know*" that they were offered with the "*expectation of compensation.*"²¹³ The "expectation" idea is a reversion to an intent standard, the intent of the offeror to receive compensation. The "reason to know" and "opportunity to reject" formulae reflect responsibility notions: They incorporate a standard based on what the reasonable person might be expected to know, and how that reasonable person might be expected to act.

The second type of exceptional case exactly replicates the moves of the first. Silence may operate as assent

[w]here the offeror has stated or given the offeree *reason to understand* that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive *intends* to accept the offer, [or w]here because of previous dealings or otherwise, it is *reasonable* that the offeree *should notify* the offeror if he does not intend to accept.²¹⁴

Thus one situation depends on making the offeror responsible, by his manifestation of intent, for the offeree who by his silence actually intends to accept. The other depends on making the offeree responsible for communicating his non-acceptance.

To summarize, one way of explaining this doctrinal corner is to say that section 69 creates a (by now familiar) refuge from the conundrum of intent—formal hierarchy: In disputes over assent, words or action trump silence or inaction. But the internal structure of section 69 subverts the formal hierarchy with exceptions: Words or actions trump silence or inaction except when the reverse is true. The reverse is true, in part, when dictated by standards of intent; the exorcised ghost reappears in the heart of the mansion. Alternatively, the reverse may be true when dictated by standards of responsibility. It is to this analysis that we now turn.

C. *The Responsibility Model*

This section explores another technique for resolving the problem of unknowable contractual intention—measuring contractual obligation by reference to the party's appropriate responsibility for his conduct and for his contract partner. The question is whether this technique is free of the difficulties we have identified not only in the "intention" model of obligation, but also in the model of formal hierarchy. The analysis draws on the

213. *Id.* § 69(1)(a) (emphasis added).

214. *Id.* § 69(1)(b)-(c) (emphasis added).

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Restatement provisions defining promise, manifestation of assent and misunderstanding, the rules about disclosure, and the doctrine of mistake. It confirms what we have already learned about the attempt to regulate contracting parties' behavior towards one another in the context of duress and unconscionability: Our norms of behavior, of contractual responsibility, are as conflicted and contradictory as our competing commitments to objectivity and subjectivity, on the one hand, and our competing trust and distrust of formal hierarchy on the other.

1. *From Intent to Responsibility*

The *Restatement* introduces the idea of responsibility as a basis for obligation (and a prop for intention) in its definition of promise. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."²¹⁵ Manifestations may take the form of words, acts, or failures to act, but conduct cannot be effective as a manifestation of assent unless the actor "intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."²¹⁶

In defining the promise, the *Restatement* thus shifts the focus from the promisor to the promisee and back. What the promisor does is capable of binding him if it presents itself to the promisee (justifiably) as capable of creating obligations.²¹⁷ But, at the same time, what ultimately governs is the promisor's *assessment*, measured objectively rather than subjectively, of what his conduct might mean to the promisee.²¹⁸ Here the *Restatement* simply replicates the manifestation-intent dilemma in new forms. We do not demand as either necessary or sufficient that the promisee subjectively understand the promisor to have made a commitment: How could we know save through outward manifestations of the promisee's understanding? Nor do we demand that the promisor subjectively understand that his conduct would lead a reasonable promisee to infer assent. We demand instead that the promisor's manifestations be such that we, and therefore he, might conclude as an external and objective matter that a reasonable promisee could understand that a commitment was made. We are given no guidance about when that might be—nothing, that is, to fill the empty "manifestation of intent" formulation.

The *Restatement* definition of assent contains a variation of the same

215. *Id.* § 2(1).

216. *Id.* § 19(2).

217. *See id.* §§ 2(1), 2 comment b.

218. *Id.*

formulae: A contracting party manifests assent when he knows or has reason to know that the other party may infer assent.²¹⁹ The knowledge of the contracting party, like his intent, is ultimately unavailable to us, so both inquiries actually revolve around the question of whether the contracting party has reason to know how his conduct will be interpreted.²²⁰ Presumably the other party may infer assent when, to borrow from the definition of promise, he would be "justified in understanding"²²¹ that assent had been given. But, again, the *Restatement* gives no guidance for determining when such a justification exists.

Even as the *Restatement* in this definition of assent moves inexorably away from an "intent-based," subjective model of obligation, there is a move to reintroduce subjectivity into the standard by insisting that the assentor will under no circumstances be obligated unless he "intends"²²² to engage in the conduct that is interpreted as manifesting assent. This weak intent is surely kin to the "general intent" of criminal law under which everything short of somnambulation qualifies as "intentional"; it has no bearing, in other words, on the subjective intent of the assentor to *assent*. Yet the formulation allows the *Restatement* to reassert its commitment to contractual obligation as, in some sense, *voluntarily* undertaken, thereby avoiding a more thorough exploration of the objective standard introduced to supplement the subjective one.

The question now is whether other provisions of the *Restatement* give us more insight into what the objective standards of responsibility are and how they should be applied. The *Restatement* offers two separate visions: In one, responsibility is based on fault;²²³ in the other, on assumption of risk.²²⁴ The fault version recognizes that the standard is indeed an objective, external, or public one, but does not resolve the problem of its content.²²⁵ Specifically, running before the problem of power, it founders on

219. *Id.* § 19(2).

220. Our assessment of knowledge, like our assessment of intent, is based on objective manifestations and circumstances. The colloquialism "he must have known" expresses exactly the nature of the conclusion we draw. But precisely those same manifestations and circumstances determine our conclusion that someone had "reason to know." The analyses diverge only where the evidence is ambiguous. If our object is to ascertain knowledge, we weigh the credibility of the knowledge claim against the credibility of the lack-of-knowledge claim. When our object is to decide what someone had reason to know, however, we may ultimately disregard evidence of lack of actual knowledge as irrelevant, although credible. In a particular verdict rendered by a jury, or a particular decision by a judge, it may not be clear which route has been chosen.

221. *See id.* § 2(1).

222. *Id.* § 19(2).

223. *See infra* text accompanying notes 226–258. I use the *Restatement's* treatment of misunderstanding and disclosure as my principal examples of the operation of a fault-based model of responsibility.

224. *See infra* text accompanying notes 259–271. I use the *Restatement's* treatment of mistake as my principal example of the operation of assumption of risk as a model of responsibility.

225. It is no accident that Holmes was advocating an objective theory of fault for torts at the same time he was advocating an objective theory of intent for contract. *See* O.W. HOLMES, THE COMMON

conflicting commitments to self-reliance and to regard for others. The assumption of risk version equates responsibility with agreement and therefore with intent; it consequently reproduces, in a roundabout way, the defective model it sought to fix.

2. *Responsibility as Fault*

The possession of knowledge and the existence of relationship are both potential sources of duty, and therefore of culpable dereliction of duty, in the contractual contexts of misunderstanding, disclosure, and mistake. The central question here is when and why one contractual party should be responsible for protecting the other from ignorance, whether by searching out the other party's interpretation of the agreement or by sharing information with him. The central difficulty is that the law contains contradictory impulses without providing determinative guidelines for the relevant scope of application of each principle. The law suggests that each party to a contract must look out for his own interest without concern for that of the other party, while simultaneously suggesting that this self-interest must have limits.²²⁶

The *Restatement's* treatment of misunderstanding focuses on the responsibility of one contractual party to understand the meaning attached to the contract by the other.²²⁷ Where neither party knows or has reason to know the different meaning attached by the other, or both parties know or have reason to know the different meaning attached by the other, there is no contract.²²⁸ Where one party neither knows nor has reason to know the meaning attached by his partner, but the other party knows or has

LAW 63-129 (M. Howe ed. 1963). In torts, as in contracts, it seemed crucial that liability be in some way voluntarily undertaken. In torts, as in contracts, voluntarism seemed to require a subjective appreciation by the actor that his conduct entailed liability. In torts, as in contracts, this was reflected in terms such as "intent" or "fault," terms amenable to interpretation as subjective concepts. But in torts, as in contracts, the potentially subjective was inevitably tamed and co-opted as the terms were actively "objectified." See, e.g., *id.* at 116-21. In the arena of fault-based liability, this plays itself out in judicial manipulation of the "reasonable man" marionette. As Holmes comments, "The difficulty of distinguishing rules based on other grounds of policy from those which have been worked out in the field of negligence, will be particularly noticed." *Id.* at 121. In torts, as in contracts, the remaining question is what standard of behavior will be imposed.

226. See *supra* note 93 and accompanying text.

227. RESTATEMENT (SECOND), *supra* note 6, § 20.

228. According to the *Restatement*:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the other; or

(b) each party knows or each party has reason to know the meaning attached by the other.

Id. § 20(1).

reason to know the meaning the first party attaches, the contract is formed according to the meaning attached by the first party.²²⁹

As already suggested,²³⁰ what a contractual party knew is always a conjecture based on objective manifestations and circumstances that lead us to conclusions about what he knew. Those same manifestations and circumstances become our guide to what he had reason to know so that, as a practical matter, the two inquiries are very much the same. The crucial point here is that the "reason to know" standard explicitly contains both a self-regarding and an other-regarding element. "Reason to know" is chosen by the *Restatement* in place of "should know" precisely because it applies "both where the actor has a duty to another and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know."²³¹ Thus, although misunderstanding depends on the idea of fault,²³² and the various vocabularies of fault are invoked to explain its operation,²³³ the nature of "fault" in this context remains fundamentally ambiguous.²³⁴

*Frigalimont Importing Co. v. B.N.S. International Sales Corp.*²³⁵ illustrates the potential difficulties with the "reason to know" standard. A Swiss buyer sued an American seller in breach of warranty for supplying old stewing chicken or fowl, in lieu of young broiling or frying chicken, under a contract that called simply for the supplying of "chicken." The seller was comparatively new in the poultry business.²³⁶ The buyer attempted to establish a trade usage whereby "chicken" was understood to mean "young chicken," in order to bring the case within the principle that

229. The *Restatement* provides:

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Id. § 20(2).

230. See *supra* note 220.

231. RESTATEMENT (SECOND), *supra* note 6, § 19 comment b.

232. "The basic principle . . . is stated in Subsection (1): no contract is formed if neither party is at fault or if both parties are equally at fault. Subsection (2) deals with cases where both parties are not equally at fault." *Id.* § 20 comment d.

233. "If one party knows the other's meaning and manifests assent intending to insist on a different meaning, he may be guilty of misrepresentation Under Subsection (2) (b) a party may be bound by a merely negligent manifestation of assent, if the other party is not negligent." *Id.*

234. The illustrations provided in the commentary to § 20 detail the consequences that follow from one party either knowing or having reason to know the meaning attached by the other. None discusses how the fact-finder should arrive at that initial assessment.

235. 190 F. Supp. 116 (S.D.N.Y. 1960), reprinted in KESSLER & GILMORE, *supra* note 8, at 711.

236. 190 F. Supp. at 119.

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where a usage is “so generally known in the community” the defendant’s “actual individual knowledge of it may be inferred.”²³⁷

First, it is interesting that Judge Friendly seemed prepared to apply the principle urged by the plaintiff as long as such usage could be shown to exist, even though other evidence clearly indicated that the defendant was unaware of the usage.²³⁸ Creating this irrebuttable presumption of knowledge involves a shift from an intent-based model to a responsibility model: The defendant is liable because of what he should have known rather than what he knew, even though the language of intent is artificially preserved.

Within the responsibility paradigm, it remains to decide whose the responsibility is, and whence it derives.²³⁹ The possibilities are manifold. One argument would be that when two contracting parties deal in a commodity frequently traded, each is responsible for checking whether his understanding of the contractual language comports with trade usage. Any different interpretive claim would therefore be rejected unless the parties had explicitly agreed on an alternative use. But then what of the situation, as in *Frigalment*, where one party is an experienced trader in the commodity and the other is not? Does the inexperienced party have a responsibility to check on any trade usages of which he may be unaware, or a responsibility to reveal his lack of experience to his partner? Are those responsibilities to himself, so that he is protected from his own ignorance, or are they responsibilities to his partner who may otherwise be caught off guard with a liability greater than he anticipated? This obviously depends on how a court will allocate the risk of the mistake. Does the experienced party have a responsibility to explain any specialized usages to the less experienced party? Is that responsibility a responsibility to his partner or to himself? This too depends on how a court will later interpret the situation and allocate the risk; the inquiry thus circles back on itself. In an alternative formulation, is it the party who first introduces a term into the negotiations who has a responsibility to see that the term is understood? Or is it the responsibility of the person to whom the term is suggested to

237. *Id.* (quoting 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2464 (3d ed. 1940)).

238. The plaintiffs urged the principle in a stringent New York reformulation requiring that, “the usage is of so long continuance, so well established, so notorious, so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of their agreement.” 190 F.Supp. at 119 (quoting *Walls v. Bailey*, 49 N.Y. 464, 472–73 (1872)).

239. This analysis is suggested by the facts of the case, but not derived directly from it, because the case is resolved without an allocation of responsibility for knowing the contract’s meaning. *See infra* note 241.

ensure that his understanding of it is clear? The permutations seem endless²⁴⁰—not because we find the various articulations of responsibility unpersuasive, but rather because too many articulations, suggesting different outcomes, are persuasive.²⁴¹

In disclosure cases, the issue shifts from when one person should be sensitive to the meaning the other party is ascribing to the contract (whether for his own or the other's sake), to when one contracting party has a responsibility to share information with the other so that their understandings of the contract coincide. The doctrine builds from the seductively simple, and shared, moral proposition that lying is wrong.²⁴² But in

240. There are some parallels here to the long-winded and unsatisfying debate about the mailbox rule, whereby an acceptance is valid upon dispatch. While there is more often an open recognition that neither party is "at fault" when the letter of acceptance miscarries, see, e.g., Stimson, *Effective Time of an Acceptance*, 23 MINN. L. REV. 776, 777 (1939), one resolution has been to attach "responsibility" to one party by making it responsible for the default of the agency of communication. *Id.* See also *Household Fire & Carriage Accident Ins. Co. v. Grant*, 4 Ex. D. 216 (C.A. 1879), reprinted in KESSLER & GILMORE, *supra* note 8, at 284 (noting that both parties are "innocent," but placing burden on offeror of ascertaining offeree's decision). More generally, there is a tendency to focus only on the "difficulties of one party," Stimson, *supra*, at 782, which aids resolution of the particular case but not the development of general principle.

At one stage removed from the focus on the parties, the argument shifts to the preferability of judicial passivity over judicial activity: "Unless the court interferes, [the loss] will fall on the offeree. In similar situations the equity doctrine is that a court will leave the loss where it falls, because there is no reason for transferring it . . ." *Id.* at 777 (footnote omitted). This ignores the way in which the judge's passivity depends on the legal system's active allocation of entitlement. Or, similarly, preserving the status quo is preferred, but without consensus as to what that requires. Compare C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* 20-21 (2d ed. 1880), reprinted in KESSLER & GILMORE, *supra* note 8, at 287-88:

Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists of depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything in statu quo.

with Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 795 (1939), reprinted in KESSLER & GILMORE, *supra* note 8, at 288 ("[T]he offeree is already relying, with the best reason in the world, on the deal being on; the offeror is only holding things open . . .").

241. It is interesting, in light of this discussion, to analyze what Judge Friendly actually did in the *Frigaliment* case. He found no overwhelming trade usage, but a variety of usages supporting both the plaintiff's and the defendant's position. *Frigaliment*, 190 F. Supp. at 119-20. Because the case was brought not as a case of misunderstanding but as one of breach of warranty, Friendly was able to resolve the issue by a procedural presumption. Since the plaintiff could not carry the burden of establishing *its* interpretation as the correct one, the defendant prevailed. *Id.* at 121. In a later case, Friendly ruminated again on *Frigaliment*, and concluded that perhaps the case would have been better disposed of as a case of fatal ambiguity, recognizing that neither party had reason to know of the disparate interpretation of the other. *Dadourian Export Corp. v. United States*, 291 F.2d 178, 187 n.4 (2d Cir. 1961) (Friendly, J., dissenting). But then Friendly justified the actual outcome of his earlier decision by suggesting that even as a case of ambiguity, the loss could be left on the plaintiff because of the defendant's "not unjustifiable change of position." *Id.* Here, a trumping remedial idea of reliance is used to serve the same function as the original trumping procedural device of the burden of proof—with a convenient lack of regard for the fact that the plaintiff's change of position, given that its interpretation of the contract was equally valid, was equally justifiable. In both analyses, therefore, Friendly declined to engage in the responsibility debate as it affected interpretation of the contract.

242. RESTATEMENT (SECOND), *supra* note 6, § 159. This section explains that "[a] misrepresentation is an assertion that is not in accord with the facts." Under § 162(1), a misrepresentation is

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defining the lie it moves away from consensus and back into the controversial territory where arguments for self-reliance compete with arguments for the protection of others.

Under the *Restatement* scheme, the essential question is whether there has been culpable non-disclosure.²⁴³ Traditionally, “mere” non-disclosure has not entailed liability;²⁴⁴ this is an expression of the more general principle in our private law that passivity (omission) cannot be culpable—only activity can generate liability.²⁴⁵ The *Second Restatement* therefore makes non-disclosure culpable when it is “equivalent to an assertion.”²⁴⁶ The task then becomes one of defining those instances where what appears to be inaction or omission can be translated into action or commission by the addition of some other variable.²⁴⁷ Unfortunately for determinability of outcome in this area of doctrine, translation is easy or difficult according

fraudulent if:

the maker intends his assertion to induce a party to manifest his assent and the maker

(a) knows or believes that the assertion is not in accord with the facts, or

(b) does not have the confidence that he states or implies in the truth of the assertion,

or

(c) knows that he does not have the basis that he states or implies for the assertion.

Id. § 162(1). For purposes of contract law, the misrepresentation must also be material. *See id.* § 162(2).

243. *Id.*

244. *See, e.g., Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E. 2d 808 (1942), reprinted in *KESSLER & GILMORE, supra* note 8, at 57. Commenting on the alleged nondisclosure, the *Swinton* court observed:

There is no allegation of any false statement or representation, or of the uttering of a half truth which may be tantamount to a falsehood. There is no intimation that the defendant by any means prevented the plaintiff from acquiring information as to the condition of the house. There is nothing to show any fiduciary relation between the parties, or that the plaintiff stood in a position of confidence toward or dependence upon the defendant. So far as appears the parties made a business deal at arm's length. The charge is concealment and nothing more; and it is concealment in the simple sense of mere failure to reveal, with nothing to show any peculiar duty to speak.

311 Mass. at 678, 42 N.E.2d at 808. The court proceeded to uphold “the rule of nonliability for bare nondisclosure.” *Id.* at 679, 42 N.E.2d at 809.

245. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 373 (5th ed. 1984). For general discussion of this principle, see Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209, 273, 337 (1905); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30 (1951); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949); Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951). For an introductory philosophical treatment of the distinction, see C. FRIED, *RIGHT AND WRONG* 17–20 (1978).

246. RESTATEMENT (SECOND), *supra* note 6, § 161. Indeed, “active concealment” is not even treated as non-disclosure but falls instead into the category of misrepresentation by action. *See id.* § 160.

247. *See, e.g., Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 678, 42 N.E.2d 808, 808 (1942) (quoted *supra* note 244); W. PROSSER, *supra* note 245, at 374:

In theory the difference between the two is simple and obvious; but in practice it is not always easy to draw the line and say whether conduct is active or passive. It is clear that it is not always a matter of action or inaction as to the particular act or omission which has caused the plaintiff's damage

(footnotes omitted).

to competing but equally available criteria which depend, again, on notions of self-reliance and responsibility for others.

An important version of this translation involves introducing a relationship that turns the simple omission into a positive breach of duty.²⁴⁸ Even when the relationship is merely that of contracting parties, they are bound to act vis-a-vis one another "in good faith and in accordance with reasonable standards of fair dealing."²⁴⁹ When the relationship is one of "trust and confidence," it transcends the usual requirements.²⁵⁰ Yet the assumption remains that, as a prima facie matter, contracting parties are not responsible for one another.²⁵¹ The commentary is quite explicit about the self-reliant element in the law:

A party may . . . reasonably expect the other to take normal steps to inform himself and to draw his own conclusions. If the other is indolent, inexperienced or ignorant, or if his judgment is bad or he lacks access to adequate information, his adversary is not generally expected to compensate for these deficiencies.²⁵²

Note not only the comprehensive list of circumstances in which informational disadvantage can supposedly be safely ignored, but also the casting of the contractual relationship as a basically adversarial one.

This conflict between self-reliance and responsibility leaves unresolved when disclosure will be demanded by "good faith . . . and reasonable standards of fair dealing, as reflected in prevailing business ethics,"²⁵³ or when a relationship will be deemed to have heavier responsibilities attached to it.²⁵⁴

The courts that address these issues seek refuge from these uncertainties in two principal ways: Either they retreat from the problem into the infinitely manipulable distinction between act and omission,²⁵⁵ or they appeal

248. See W. PROSSER, *supra* note 245, at 375:

The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has got himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him.

(footnotes omitted). A potent analogy from the law of tort is the presence or absence of a duty to rescue. See *id.* at 340-50.

249. RESTATEMENT (SECOND), *supra* note 6, § 161(b).

250. *Id.* § 161(d).

251. See, e.g., *id.* § 161 comment a.

252. *Id.* § 161 comment d.

253. *Id.*

254. *Id.* § 161 comment f.

255. See, e.g., *Obde v. Schlemeyer*, 56 Wash. 2d 449, 451-52, 353 P.2d 672, 674 (1960) (pest control specialist made repairs so no external evidence of termites, but sellers unwilling to pay for complete eradication; court harnessed good faith standard to action-omission distinction); RESTATEMENT (SECOND), *supra* note 6, § 161 comment d, illustrations 10, 11 (cases involving same business context differentiated by means of action-omission distinction).

to standards of behavior established by the business community or in other areas of the law.²⁵⁶ This latter device allows judges to overcome the problem of legitimacy involved in imposing a public norm by lodging the authority for that norm elsewhere,²⁵⁷ even while the array of standards available from those other sources leaves them in fact responsible for choosing whether to impose liability.²⁵⁸

As in the other areas in which a responsibility model is employed to fix contractual liability, therefore, the decision of when to fault a failure to disclose may be evaluated according to contradictory criteria. Rather than curing the indeterminacy of the models of intent and formal hierarchy, the model of responsibility thus adds yet another layer of indeterminacy to the decisionmaking process.

3. *Responsibility as Assumption of Risk*

In the foregoing exploration of responsibility as a model of resolving problems of contractual liability, I touched upon the way in which primarily objective measures of externally imposed responsibility can be recast as subjective and voluntary undertakings of responsibility. Judge Friendly's analysis of the effect of long-standing usage on contractual interpretation, for example, adopted this approach.²⁵⁹ In further pursuing the technique by which responsibility analysis circles back to rely on ideas of intent and agreement, I focus on the idea of "assumption of risk" as it operates in the doctrine of mistake.²⁶⁰

Section 152 of the *Restatement* provides that a contract is voidable when a mistake of both parties is a mistake "as to a basic assumption on which the contract was made," and when it "has a material effect on the agreed exchange of performances."²⁶¹ But there is an additional requirement: The contract is still not voidable if the adversely affected party "bears the risk of the mistake under the rule stated in section 154."²⁶² This occurs when:

256. See, e.g., RESTATEMENT (SECOND), *supra* note 6, §161 comment d; Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 11 & nn.23-25 (1936).

257. This is analagous to the reliance of duress doctrine on crime and tort law for its categories of improper threat. See *supra* notes 130-31 and accompanying text.

258. Keeton describes, for example, how non-disclosure law relies on special relationships already defined by other bodies of law for other purposes, but determines whether the relationship in the particular case falls into or out of the special category based on the articulation of reasons for promoting either self-regarding or other-regarding behavior in the particular situation. Keeton, *supra* note 256, at 11 & nn.23-25.

259. See *supra* note 241 and accompanying text.

260. RESTATEMENT (SECOND), *supra* note 6, § 152(1). The doctrine of impracticability has precisely the same structure. See *id.* §§ 261, 265, 266.

261. *Id.* § 152(1).

262. *Id.*

- (a) the risk is allocated to him by agreement of the parties, or
- (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.²⁶³

The central question here is the content of assumption of risk. Mistake doctrine deals with circumstances the contract did not anticipate, but which nonetheless impinge on the performance of the contract. When these circumstances adversely affect one of the parties, either in his ability to perform or in what he can expect from the contract, then the question is raised whether he must still perform, or still pay for the other party's performance. The doctrinal answer is no, unless that party has borne the risk of these adverse circumstances. Rather than raising the responsibility paradigm to any new level of sophistication or workability, section 154 simply restates the choice between an unsatisfactory "manifestation of intent" model²⁶⁴ and an equally unsatisfactory "objective fault" model,²⁶⁵ and concludes with the frank recognition that, after all, the judge is free to choose.²⁶⁶

Section 154(a) imagines that the parties share a basic assumption about a circumstance of their deal (in which they are both mistaken), but that their deal also focuses on the question of what should be done if they are mistaken, and incorporates an allocation of the costs of the mistake. This unlikely scenario requires a large-scale inquiry into manifestations of intent: to know what are and are not basic assumptions of the contract, and to know what language or circumstance is evidence of risk allocation. We have already explored the risks of this sort of inquiry, risks compounded where, as here, we acknowledge that we are investigating how the parties have regulated a situation rather different from the one they came together to regulate.

Section 154(b) focuses on the individual party and not the agreement, and within that framework adopts a "fault" standard: The party who walks into a deal aware that his knowledge of the circumstances is incomplete, but goes ahead with the deal and then suffers when things turn out other than he had hoped, has only himself to blame. In this sense he has taken responsibility on himself. But we can never know that someone is "aware" of his limited knowledge; at best we objectify the standard and

263. *Id.* § 154.

264. *See id.* § 154(a).

265. *See id.* § 154(b).

266. *See id.* § 154(c).

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ask whether the circumstances indicate awareness, or whether he should have been aware.²⁶⁷

Section 154(c) can be seen as the final honest moment of section 154, a moment not without parallels elsewhere in the *Restatement*.²⁶⁸ In section 154, as elsewhere, an initial attempt is made to constrain judicial discretion by articulating standards governed by one or more of the basic dichotomies. The concession to reality does not appear until the end, when the judge is provided with another option: In unspecified circumstances, he may make his decision on some "other" basis, which must be "reasonable" or "just."²⁶⁹

Here, for example, subsection (c) tells us that the court may allocate the risk when it is reasonable to do so.²⁷⁰ By what criteria could the court make this judgment and still avoid the charge that it has merely exercised an illegitimate dispensing power? Could it ever be reasonable to allocate risk save on the basis of the manifested agreement, as subsection (a) suggests, or on the basis of objectified fault, as subsection (b) provides? Further, has not our investigation of the particular failures of subsections (a) and (b) shown them to be merely more elaborately disguised versions of subsection (c)? If so, the candor of section 154 presents a microcosm of the form of discourse I have been describing.

D. Summary

I have been describing the dynamic that operates in areas of doctrine caught between the commitment to objectivity expressed as reliance on "manifestation," and the commitment to subjectivity expressed as reliance on "intent." I have suggested that while contract doctrine on occasion relies squarely on divining intent, and ignores the gulf between subjective intent and the communication of that intent to others, by and large those acknowledged difficulties of communication drive doctrine to use other interpretive or liability-fixing devices. Formal hierarchy and standards of responsibility are two such devices.

267. This again raises the question of how responsibility should be allocated between the contracting parties.

268. See, for example, § 351 which establishes in subsection 1 that damages are not recoverable for unforeseeable loss, and defines in subsection 2 what qualifies as foreseeable loss, but then, in subsection 3, provides that recovery for foreseeable loss may be limited "by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation." *Id.* § 351(3).

269. The text of § 154(c) uses "reasonable," while comment d to that section amplifies that the court here is to use criteria "other" than those articulated in earlier subsections. *Id.* § 154(c) & § 154(c) comment d. Section 351(c) permits the limitation of recovery of foreseeable loss in some specific circumstances, but then adds that the same limitation is available "otherwise," if "justice so requires." *Id.* § 351(c).

270. *Id.* § 154(c).

The central problem in this area is that of knowledge—of access to intent, or understanding. But if contract doctrine is no longer to rely on intent and understanding as the basis of liability, then contract becomes something other than a system of voluntary obligation. And as a body of public rather than private obligation, it then must articulate the public norms on which it rests. In relying on formal hierarchy, doctrine occasionally makes a weak appeal to the public values of certainty and stability.²⁷¹ More often, doctrine completes a circle by justifying hierarchy as the expression of intention. In relying on responsibility, doctrine attempts to evade the problem of knowledge by straying into territory made equally treacherous by the problem of power. As suggested by our earlier look at the doctrines of duress and unconscionability, and affirmed here, we have no reliable, and therefore no legitimate, basis for allocating responsibility between contracting parties. Finally, then, it is the interaction of the problems of power and knowledge that leaves these areas of doctrine without a determinate basis for resolving contractual disputes.

III. FORM AND SUBSTANCE: CONSIDERATION AND THE QUESTION OF VALUE

If the problem of knowledge is the central problem for those areas of doctrine concerned with contract formation and interpretation, then the problem of power is the central problem of both consideration doctrine and the related doctrine of reliance. The consideration requirement can be presented as consistent with a view of contractual obligation as essentially voluntary and private. But consideration is inevitably seen as serving a policing function—sorting out those agreements that will be enforceable as legal obligations. It therefore raises two questions: Why is such a policing mechanism necessary? Under what circumstances should the state intervene in agreements privately reached between individuals? These are the same questions we asked in the area of duress and unconscionability.

The problem of power is expressed concretely in consideration doctrine through the question whether consideration should be viewed as a doctrine of form or of substance. The attempt to view consideration as a doctrine of form serves the same function as the attempt to view duress and unconscionability as doctrines of process: Each appeals to assertedly neutral or consensual standards. But any attempt to cast consideration as a requirement of form leaves us asking “Form of what?”—a question that demands a substantive answer. Similarly, if we were to insist that consideration be

271. Even the investigation of certainty and stability reveals them to be fatally dependent on predictions about understanding and about allocations of responsibility.

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exclusively a doctrine of substance, we would have to ask what representations or forms would satisfy us that the substantive requirement had been met.

This dilemma exactly parallels that of manifestation and intent. The manifestation-intent dichotomy is in fact just a special case of the form-substance dichotomy, its version of substance being the subjective content of the parties' intentions or understandings. In the consideration context, the interplay between form and substance is more complex. Initially, it seems that consideration doctrine is most concerned to avoid the substance of objective value—the courts, as already illustrated in the duress and unconscionability context, abhor the idea that they should police the equivalence of the parties' exchange. But in the effort to answer the "Form of what?" question without reference to objective value, doctrine is forced back to the alternative substance of subjective intent.²⁷² Value, in this view, is a subjective matter, knowable only by party expression of intent to bargain. Fleeing before the problem of power, doctrine finds itself trapped once more in the realm of the problem of knowledge.

My exploration is designed to show that the mutual dependence of form on substance, and substance on form, is the threat against which doctrinal formulations (unsuccessfully) attempt to defend themselves. I suggest that determinacy of outcome is impossible as long as the debate is cast in terms of form and substance (whether substance means objective value or subjective intent). I use reliance doctrine and cases principally for what they tell us about the consideration doctrine from which they would distinguish themselves.

A dominant theme in our current doctrine of consideration is the "bargain theory," which was an integral part of the classical model of contract law developed by Holmes and Williston.²⁷³ The "bargain theory" replaced a more inchoate conception of consideration loosely tied to benefit on the part of the promisor, or detriment on the part of the promisee.²⁷⁴ This earlier conception, in turn, was linked to a focus on executed and partially

272. Consideration doctrine contains no internal mechanism for shifting the focus to standards of behavior. Rather, disputes in which behavior questions predominate are seen as more suitable for resolution under the "process" doctrines of duress and fraud. Good examples are provided in the area traditionally conceived as contractual modification. *See, e.g.,* *Austin Instrument v. Loral Corp.*, 35 A.D.2d 387, 316 N.Y.S.2d 528 (App. Div. 1970), *rev'd in part, modified in part*, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971). Indeed, during the shaping of the classical law of contract, a concern with standards of behavior was sometimes recast as a more "neutral" concern with the presence or absence of consideration. *See, e.g.,* *Stilk v. Myrick*, 170 Eng. Rep. 1168 (K.B. 1809), *reprinted in* KESSLER & GILMORE, *supra* note 8, at 478.

273. G. GILMORE, *supra* note 29, at 18–34.

274. *Id.* at 19; *see also* Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 933 (1958).

executed contracts,²⁷⁵ which usually involved a party who had benefited, or one who had suffered a loss in reliance on the deal.²⁷⁶

The standard story tells us that the bargain theory of consideration reflected and supported a commitment to liberal, laissez-faire economic theory.²⁷⁷ Like that theory, the bargain model of consideration insisted that only the participants could measure the value of a deal, and that a system of such subjectively assessed values would produce the markets required for a smoothly functioning and efficient economy.²⁷⁸ Individualism and the predominance of will are seen as natural ideological corollaries of such a system.²⁷⁹

The standard story also tells us that the bargain theory never completely replaced its more inchoate predecessor theories.²⁸⁰ The idea of detriment and benefit as alternative reasons for enforcing contracts persisted as an influence in the *First Restatement*. And in the move from the *First* to the *Second Restatement*, detriment and benefit have come to play an even larger role, at the expense of bargain theory.²⁸¹

This story does not challenge the internal coherence of a formal bargain theory of consideration. It accepts the idea that notions of benefit and detriment could be excised if we, as a society, decided to excise them. My hypothesis, in contrast, is that it is impossible to construct a bargain theory of consideration that does not supplement its commitment to a subjective theory of value *either* by reference to a subjective theory of intent, *or* by reference to an objective theory of value. Given the repudiation elsewhere in doctrine of the theory of subjective intent,²⁸² reliance on such a theory in the realm of consideration is found only in disguised forms, frequently "objectivized" by derivation from notions of objective value. Similarly, given doctrine's repudiation of objective value,²⁸³ its appearance in this arena is also disguised, often by reference to the intention of the parties.

For an initial demonstration, I use Holmes' own formulation of the consideration requirement, and a case in which Williston's account formed the basis of the court's decision. Then I look at more recent materials,

275. P. ATIYAH, *supra* note 27, 139-54, 167-89, 419-48 (1979).

276. *Id.*, especially at 167-89.

277. *See, e.g., id.* at 398-405; Patterson, *supra* note 274, at 945-46.

278. *See, e.g., P. ATIYAH, supra* note 27, at 448-54.

279. *See, e.g., id.* at 260-61, 405-08; Patterson, *supra* note 274, at 946.

280. *See, e.g., G. GILMORE, supra* note 29, at 60-66, 69-77.

281. *Id.*

282. *See supra* text accompanying notes 150-174 (my account of objectification of intent).

283. *See, e.g., RESTATEMENT (SECOND), supra* note 6, § 79 comment c; *see infra* text accompanying notes 323-330.

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with two questions in mind: first, whether the basic structure of the problem has changed in the *Second Restatement* or in more current cases; second, how the articulation of the problem and proposed resolutions have changed, if the basic structure of the problem has not.

A. A Bargain Theory of Consideration

In *The Common Law*, Holmes sets forth his classic exposition of the bargain theory of consideration:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.²⁸⁴

It is equally clear, however, that consideration “must not be confounded with what may be the prevailing or chief motive in fact.”²⁸⁵ As Holmes comments, “[T]he whole doctrine of contract is formal and external.”²⁸⁶ In sum, then, it is the appearance of the *form of bargain* in the *terms of the agreement* which satisfies the consideration requirement.

Holmes applies this definition of consideration in *Wisconsin & Michigan Railway v. Powers*.²⁸⁷ A statute of 1893 exempted from a railroad tax any railroad that built and operated a particular line. The plaintiff company fulfilled the statutory condition. When the exempting provision was repealed four years later, the plaintiff complained that the government had broken its contract. Holmes found that the so-called contract lacked consideration.²⁸⁸

Holmes reasoned that building the railroad was certainly a sufficient detriment or change of position to constitute consideration, but the agreement lacked “an adequate expression of an actual intent on the part of the State to set change of position against promisee.”²⁸⁹ Thus, although “[n]o doubt the State expected to encourage railroad building, and the railroad

284. O.W. HOLMES, *supra* note 225, at 230.

285. *Id.*

286. *Id.* (marginal annotation made by Holmes, reproduced as lettered footnote in the Howe edition).

287. 191 U.S. 379 (1903), *reprinted in* KESSLER & GILMORE, *supra* note 8, at 206.

288. 191 U.S. at 386-87. The case could equally as well have been decided on the alternative ground articulated in his opinion; namely that the legislature was not engaged in making contracts, but in framing a scheme of public revenue and public improvement. *Id.* at 387.

289. *Id.* at 386-87.

builders expected the encouragement, . . . the two things are not set against each other in terms of bargain."²⁹⁰

This seems a confirmation of Holmes' position that consideration is a matter of form. It seems that the "expression"²⁹¹ of intent, rather than the actual intent, is lacking. Holmes does not doubt the relationship of mutual expectation, but the promise and the consideration must actually "purport"²⁹² to be the motive for each other. Presumably, it would have been enough if the statute had said, "In return for a railroad company building and operating this line which the state is interested in seeing in operation, the state will exempt the company from the tax."

That hypothetical language, however, is hardly different from the actual language of the statute: "[T]he rate of taxation fixed by this act . . . shall not apply to any railway . . . hereafter building and operating space . . ."²⁹³ What form do we imagine *would* satisfy the requirement, if this does not? Further, what are we supposed to make of Holmes' very ambiguous sentence, "No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other . . ."²⁹⁴ Does the parenthetical "by the express or implied terms of the supposed contract"²⁹⁵ refer to our discovery of the actual motive of the parties? Since we are not supposed to be interested in those motives, it seems more likely that it refers to the promise and consideration, and means that they may take on their relationship of conventional inducement through either express or implied terms of the contract. But if the latter were true, consideration could not be exclusively a doctrine of form, since it is hard to see how implied terms could satisfy formal requirements.

These doubts suggest another interpretation of the case: Holmes is looking for, and not finding, an actual, subjective intent to bargain. This gives a different significance to Holmes' conclusion that the agreement lacks "an adequate expression of an *actual intent* on the part of the State to set change of position against promise."²⁹⁶ Surely that "actual intent" itself requires expression or manifestation to be known. But just as the building of the railroad could have been consideration if the form of the contract had been that of bargain, so too it seems that the form of the contract could have been interpreted as a form of bargain if there had been evidence of the intent of the State to be bound. In the final analysis, Holmes'

290. *Id.* at 387.

291. *Id.* at 386-87.

292. *Id.* at 386.

293. *Id.* at 384.

294. *Id.* at 386.

295. *Id.*

296. *Id.* at 386-87 (emphasis added).

opinion employs an essentially circular argument, and—despite Holmes' desire to separate form and substance—the opinion ultimately depends on the substance of intent to validate the form of bargain.²⁹⁷

The case of *Maughs v. Porter*²⁹⁸ illustrates the way in which a second notion of substance—objective value—is used to give meaning to the otherwise empty notion of form of bargain. In explicating the bargain theory, the *Maughs* court relied on Williston, who, like Holmes, was a major exponent of the theory and who increased its influence by codifying it in the *First Restatement*.²⁹⁹ In *Maughs*, the defendant planned to auction lots of residential land. He advertised that every adult white attending the sale would have a chance to win a new Ford; it was not necessary to bid on the real estate to qualify for the prize. Although the plaintiff attended the auction, received a lottery ticket, and was declared the winner of the automobile, the defendant refused to give her the car.

The court's task was to determine whether the defendant's advertisement was an offer of a unilateral contract, accepted when the plaintiff attended the auction, and thereafter binding on the defendant, or rather an offer conditioning a gift promise, revocable by the defendant at any time prior to execution. The court's decision depended on finding a consideration passing from the defendant to the plaintiff.

The court cites an example used by Williston: “[A] benevolent man says to a tramp—‘if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit.’”³⁰⁰ Williston concedes that the tramp's walk to the shop “is in its nature capable of being consideration.”³⁰¹ But the reason it does not qualify, says Williston, is that “the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise.”³⁰² How do we know? Williston acknowledges that it will often be difficult to tell.³⁰³ The case of the tramp is obviously made easier for him because he has already defined the donor as “a benevolent man,”³⁰⁴ a move which begs the question if our inquiry is

297. Once the presence of consideration is revealed to depend on intent to bargain, Holmes' consideration argument is revealed as identical to his alternative ground for decision—that the legislature was not making promises, but framing a scheme of public revenue and public improvement which would only be pursued as long as the state thought it prudent to do so. *Id.* at 387. See *supra* note 288.

298. 157 Va. 415, 161 S.E. 242 (Sup. Ct. App. 1931), reprinted in KESSLER & GILMORE, *supra* note 8, at 210.

299. G. GILMORE, *supra* note 29, at 62–63.

300. *Id.* (citing 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 112, at 232 (1st ed. 1920), quoted in *Maughs*, 157 Va. at 419, 161 S.E. at 243).

301. 1 S. WILLISTON, *supra* note 300, § 112, at 232.

302. *Id.* § 112 at 233, quoted in *Maughs*, 157 Va. at 419, 161 S.E. at 243.

303. *Id.*; see also Patterson, *supra* note 274, at 933 (“If a court need only look for a promise and a detriment to the promisee, it will have a hard time distinguishing a detriment-for-promise exchange from a conditional gratuitous promise.”).

304. *Maughs*, 157 Va. at 419, 161 S.E. at 243.

whether, in the absence of other information, we can determine whether this is bargain or gift. But Williston tells us that in these cases, "An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration."³⁰⁵

Relying on the Willistonian view, the *Maughs* court found for the plaintiff. Since the defendant "unquestionably"³⁰⁶ wanted to attract people to the auction, and stood to gain from the mere chance that if someone attended he or she was more likely to bid than if he or she had stayed home, there was a bargain and the plaintiff was entitled to recover. To summarize *Maughs'* teaching, we recognize the form of bargain in the formulation "Come to the auction and you may win a car" because, after investigation, we understand that this was a promise that named its price. We have found an "objective value" to the defendant in having people come to the auction.

What is the combined lesson of *Powers* and *Maughs*? That a bargain theory of consideration, which purports to be able to test for bargain formally and externally, in fact depends for its application upon one of two possible supplements. The form turns out to be undecipherable unless we also look to either the intent of the parties to bargain, or the objective value of the promise or performance to the party who requests it. If the supplement is of the first kind, we have simply another demonstration of how manifestations—here forms of bargain—cannot be interpreted without reference to the intent they manifest. This seems to be the dilemma as it presents itself to Holmes in *Powers*.³⁰⁷ If the supplement is of the second kind, we have an example of how forms—here forms of bargain—cannot be interpreted without reference to the substance they supposedly reflect. "Has the promise named its price?" is a question that requires us to be able, substantively, to distinguish a price from not-a-price. As Williston and *Maughs* show, an objective theory of value is required to make the latter distinction.³⁰⁸

How do these two supplements of formal bargain theory work together? The express rhetoric of contract doctrine for the most part rejects both the subjective theory of intent, which we have shown to be one hope for avoiding the impossibility of formal bargain theory, and the objective theory of value, which we have shown to be the other. What we might

305. 1 S. WILLISTON, *supra* note 300, § 112, at 233, *quoted in Maughs*, 157 Va. at 419, 161 S.E. at 243.

306. 157 Va. at 420, 161 S.E. at 244.

307. *See supra* notes 287-97 and accompanying text.

308. *See supra* notes 298-306 and accompanying text.

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expect to see in the doctrine, therefore, is a constant shuffling between these two saving devices, and the use of each in an attempt to legitimate the other, even as our attention is diverted from both by doctrine's emphasis on form rather than substance. This play of doctrine suggests that, as in other areas of contract law already discussed, decisionmaking in the area of consideration will be rendered thoroughly open. Ultimately, this openness reflects the uncertainty created by the underlying problems of knowledge and power.

B. *Consideration Pursued: Modern Times*

1. *Form and Substance in the Second Restatement*

Section 71 of the *Second Restatement* presents a current formulation of a bargain theory of consideration:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.³⁰⁹

Nothing in the text of these subsections suggests how to resolve the difficulties suggested by the previous analysis of the bargain theory of consideration. We could imagine section 71 favoring the view that consideration be "sought by the promisor in exchange . . ." ³¹⁰ either in a purely formal sense, or "actually," in the sense that he subjectively intended to seek it. Similarly, the consideration could be "given by the promisee in exchange . . ." ³¹¹ either formally, by the terms of his response, or "actually," in the sense that he provided it with the intention of responding to the promisor's invitation to bargain.

Comment b, which purports to elucidate, initially suggests that consideration is primarily a requirement of form.³¹² Specifically, it advances a formal interpretation of when consideration occurs: We look for the manifestation of "intention to induce" and intention "to be induced."³¹³ Even

309. RESTATEMENT (SECOND), *supra* note 6, § 71.

310. *Id.* § 71(2).

311. *Id.*

312. Comment b states:

Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement.

Id. § 71 comment b.

313. *Id.* The comment also betrays its commitment to manifestation when it talks about the "other's response" rather than "manifestation of response," which would presumably be the proper

here, evidently enough, substance as subjective intent plays the same supplementary role it did in the area of contract formation. But much more problematic is the last sentence of the comment, which tells us that a "mere pretense" of bargain, in the form of a "false recital of consideration," or merely "nominal" consideration, cannot qualify under section 71.³¹⁴ This passage entirely resists being recast in formal terms. While the idea of a recital of consideration is formal, the distinction between false and true recital imagines that consideration has a real essence or substance—whether conceived in terms of objective value, or of subjective intent to induce—that the false recital does not reflect. Similarly, the disqualification of nominal consideration requires distinguishing it from consideration that is real, in the sense of "having real value" or "really inducing."

Section 81 deals with "Consideration as Motive or Inducing Cause"³¹⁵ and, like Holmes, distinguishes consideration from "motive in actual fact" in order to stress the objectivity of consideration and rescue it from contamination by a theory of subjective intent.³¹⁶ But, just as in Holmes' formulation, subjective intent in section 81 resists the effort to oust it, and remains a supplementary but acknowledged feature of the doctrine.

To appreciate this, one might ask how the language of section 81, stressing that consideration need not correspond with motive or inducing cause, can be made consistent with the language of section 71, particularly the insistence of comment b of that section that mutual inducement "must be present, or there is no bargain."³¹⁷ One interpretation is that since the dominant theme in section 71 is formal manifestation of inducement, nothing in section 81 is inconsistent; since inducement obviously can be manifested without being real, section 81 is simply a reminder of that distinction.

Another interpretation is suggested by the commentary to section 81, which says that "[t]his Section makes explicit a limitation on the requirement that consideration be bargained for."³¹⁸ In this version, section 71 would appear to contain the general requirement that consideration be

parallel to a manifestation of intention. *Id.*

314. "Moreover, a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal." *Id.*

315. *Id.* § 81. The text of the section reads:

(1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.

(2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

This protestation is exactly parallel to the portion of § 19 that provides for the possibility that assent could be manifested without actual assent. *Id.* § 19.

316. O.W. HOLMES, *supra* note 225, at 230.

317. RESTATEMENT (SECOND), *supra* note 6, § 71 comment b.

318. *Id.* § 81 comment b.

bargained for, while section 81 states an exception to that rule. This presents section 71 as being about substance and *not* form; Section 81's provision for merely "manifested" inducement is exceptional only if section 71 demands substantive consideration in the sense of actual inducement.³¹⁹

The commentary to section 81 reiterates the problem of choosing between a formal and a substantive interpretation of the text. Acknowledging the substantive proposition of section 71 that a "false" recital is not consideration,³²⁰ it attempts to distinguish between the pretended consideration that is not consideration, and the consideration that is consideration although not bargained for: "Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so."³²¹ The distinction turns out to be merely the distinction between part and whole. As long as the promisor is even partly induced by the purported consideration, it will qualify under section 81. This theme is suggested even earlier in the comment with the observation that "the promisor may have more than one motive . . ."³²² Paradoxically, instead of supporting the view of consideration as form, this explanation of section 81 emphasizes consideration as substance, in the sense of subjective intention to bargain, subjective desire for the consideration.

The commentary to section 81 concludes by referring us to section 79³²³ and its illustrations. Whereas section 81 can sustain the idea of consideration as a formal requirement only by a backhanded reference to the substance of subjective intent, section 79 attempts to sustain a formal theory of consideration by creating a supplementary role for the substance of objective value.

Section 79 begins with vigorous commitment to a theory of subjective value:

If the requirement of consideration is met, there is no additional requirement of

- (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
- (b) equivalence in the values exchanged; or
- (c) "mutuality of obligation."³²⁴

319. *See id.* § 81 comment a.

320. *Id.* § 71 comment b.

321. *Id.* § 81 comment b.

322. *Id.*

323. *Id.*

324. *Id.* § 79.

In support of this commitment, the commentary makes the traditional connection between subjective value and the market economy.³²⁵

The commitment to a theory of subjective value is not, however, sustained. The most interesting qualification suggests that “[g]ross inadequacy of consideration may be relevant to issues of capacity, fraud and the like, but the requirement of consideration is not a safeguard against imprudent and improvident contracts”³²⁶ This suggests that there is no objective basis for judging the merely imprudent and improvident contract; those adjectives should therefore be subject to further qualifications such as “allegedly” or “apparently.” But it also suggests that while value is principally a private and subjective matter, there may come a point somewhere beyond the imprudent and improvident contract where there is room for objective judgment after all.

Even with respect to those cases where there is grossly inadequate consideration, however, the comment refrains from open commitment to a substantive disqualification: These contracts are not invalid *because* of the inadequacy of the consideration. Rather, the substantive inadequacy of consideration in these cases becomes evidence of the procedural failure of the contract because of “issues of capacity, fraud and the like.”³²⁷ Thus, the comment maintains the integrity of the formal vision of consideration by invoking another formal set of doctrines, doctrines that address the integrity of the bargaining process.³²⁸ This move defers any further discussion of what constitutes “gross inadequacy,”³²⁹ and thus defers the slide from form to substance, until it reemerges in accounts of the supposedly formal doctrines where its relevance has been identified. There, as already suggested by the preceding analysis of duress and unconscionability, the avoidance continues.³³⁰

A further example of the interplay between subjective and objective theories of value in the *Restatement's* account of consideration derives from the purported negation of any requirement of “mutuality of obligation.”³³¹ The older doctrine of mutuality held that a content-less promise by one party to an agreement could not serve as consideration to bind the other. In that form, the doctrine appears to contradict the earlier proposition of section 79 that consideration need involve no “gain, advantage, or benefit

325. “To the extent that the apportionment of productive energy and product [sic] in the economy are left to private action, the parties to transactions are free to fix their own valuations Ordinarily, therefore, courts do not inquire into the adequacy of consideration.” *Id.* § 79 comment c.

326. *Id.*

327. *Id.*

328. This includes not just fraud, but also “mistake, misrepresentation, duress or undue influence.” *Id.* § 79 comment e.

329. *Id.* § 79 comment c.

330. See *supra* text accompanying notes 94–139, especially 94–95.

331. RESTATEMENT (SECOND), *supra* note 6, § 79(c).

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to the promisor,”³³² which explains why the *Restatement* rejects it. But the commentary provides the by-now-expected clue that mutuality is not quite extinct, and substance not quite extinguished. A residuum of mutuality survives in both sections 76 and 77.³³³

What sections 76³³⁴ and 77³³⁵ provide is, in slightly differing formulations, that “[w]ords of promise do not constitute a promise if they make performance entirely optional with the purported promisor.”³³⁶ In other words, a form of promise is not sufficient unless it is a manifestation of the “real” promise. Nor is the reality of the promise, in this instance, to be tested exclusively by the subjective intent of the promisor; the promisor’s sense of being bound does not make the promise binding if it is an empty promise.³³⁷ Rather, the test is of the objective content or value of the promise.

Thus the *Second Restatement’s* account of consideration, of the role of motive, and of the lack of any role for doctrines of adequacy or mutuality turns out to replicate the problems of the structure of the bargain theory of consideration as formulated by Holmes and Williston.³³⁸ The starting point is still a commitment to the idea that the value of a contractual exchange is best left to the judgment of the parties; since the courts are held to have no justifiable role in imposing standards of equivalence or fairness, consideration must be principally a formal requirement. Inevitably, however, a formal theory of consideration requires some substantive input to answer the question, “Form of what?” As we have seen, one way to supply an answer without backtracking on the commitment to subjectively assessed value is to look to the subjective intent of the parties to bargain. Another way to supply an answer is to invoke the notion of objective value.

Each of these answers creates its own questions. A focus on “intent” threatens to jeopardize the social-wealth-enhancing function of consideration to which doctrinal rhetoric also pays allegiance. Such a focus also revives the dilemma of how intent is to be divined.³³⁹ As the focus shifts inevitably to *manifestations* of intent, the debate becomes once more a debate about form, but a debate no more conclusive. There is also a sense in which the move to intent may only disguise the slide to objective value;

332. *Id.* § 79(a).

333. *Id.* § 79 comment f (“The only requirement of ‘mutuality of obligation’ even in cases of mutual promises is that stated in §§ 76–77.”).

334. *Id.* § 76 (entitled “Conditional Promise”).

335. *Id.* § 77 (entitled “Illusory and Alternative Promises”).

336. *See id.* §§ 76, 77.

337. *See, e.g., id.* § 77 comment a, illustrations 1, 2.

338. *See supra* text accompanying notes 284–308.

339. *See supra* text accompanying notes 140–149.

it may very well be the court's determination of mutual advantage that provides the requisite manifestation of intent to bargain.³⁴⁰

In stressing the societal advantage of wealth-enhancing transactions, however, the focus on objective value threatens to eclipse both the intent of the parties and the image of contract law as essentially private. Nor is it an easy matter to assess objective value. Just as the intent-based escape from form frequently ends up invoking objective value, so the objective value escape frequently winds up invoking intent. Courts often move from an assessment that the contracting parties did indeed seriously intend to bargain, to a decision that each party did indeed stand to profit by the transaction.³⁴¹ These various mediations of form and substance, their interplay and their ultimate failure to resolve the conundrum they address, are explored in the next section in some characteristic case law.

2. *Intent and Value in the Cases*

In 1967, the Supreme Court of Washington decided the case of *Browning v. Johnson*,³⁴² described by the opinion's author, Judge Langenbach, as "the tale of two osteopaths who attempted a business transaction."³⁴³ More specifically, it is the tale of how Browning contracted to sell his practice to Johnson but changed his mind before the effective date of the contract. By promising to pay Johnson \$40,000, Browning persuaded him to enter another contract canceling the prior contract of sale. Browning later took Johnson to court, seeking to recover the \$40,000. The trial court found that the contract of sale had lacked mutuality, and was unenforceable.³⁴⁴ That court nonetheless concluded that the contract of cancellation was supported by "adequate consideration," and denied Browning recovery of the \$40,000.³⁴⁵ Browning appealed.

The supreme court thus faced the issue whether Johnson's agreement to cancel a contract under which the trial court had held that he had no entitlements could be consideration for Browning's promise to pay him \$40,000. The supreme court, like the trial court, held that the agreement to cancel constituted consideration.³⁴⁶ En route to that conclusion, the court invoked the various strands of consideration doctrine identified in my prior analysis.

340. For a converse example, treating the lack of objective value as undermining any manifestation of intent to bargain, see *supra* notes 300-306 and accompanying text.

341. See, e.g., *infra* notes 358-361 and accompanying text.

342. 70 Wash. 2d 145, 422 P.2d 314 (1967).

343. *Id.* at 146, 422 P.2d at 315.

344. See *id.*

345. *Id.* at 147, 422 P.2d at 315.

346. See *id.* at 148, 422 P.2d at 316.

Langenbach begins by “correcting” some of the trial court’s terminological confusion.³⁴⁷ The question to be answered is whether Johnson’s promise is supported by consideration, not whether it is supported by “adequate” consideration.³⁴⁸ “Adequacy” involves discussion of comparative values, an inappropriate inquiry. “Sufficiency” is the appropriate inquiry. The quest for sufficiency is uncomplicated by measures of value. It is simply a search for “that which will support a promise.”³⁴⁹ It is enough for the supreme court to find, as it does, that Browning’s promise is supported by consideration.

The adequacy-sufficiency distinction purports to safeguard the theory of subjective value by renouncing any attempt to decide if the exchange entered by the parties was objectively fair. The hope is that “sufficiency” can be assessed by some means other than the objective assessment of value. At one level the message is that the difference is simply one of degree: Sufficiency means just a little bit of consideration, while adequacy would mean an amount of consideration equal to the promise made. But because this distinction acknowledges the court’s ability to assess objective value at the minimal end, it threatens the claim that objective value cannot be measured. This threat is reflected in court decisions that, according to commentators, confuse the two tests. In part for this reason, the *Second Restatement* abandons the sufficiency-adequacy distinction, and talks instead about the presence or absence of consideration.³⁵⁰

The threat to the theory of subjective value persists despite such talk: Measuring the absence of consideration still involves knowing when a promise is empty, and still leaves the question of how a scale could measure emptiness but not fullness. The resolution of this problem is to maintain that the difference between emptiness and fullness is one of kind rather than degree. To measure sufficiency, or absence, of consideration thus requires a formal test, where measuring adequacy, or the presence of consideration, seemingly requires a substantive test.

Langenbach implicitly adopts this approach.³⁵¹ He thus faces the task of conducting a search for the “form” of sufficient consideration. He immediately seems to imperil the enterprise by suggesting that he must look for a benefit received by the promisor, or a detriment incurred by the promisee. But the fact that he relies on Williston protects him from any crass assertion that he is looking for objectively measurable benefit or detriment.

First, Williston tells him that it is not necessary to look for benefit; the

347. *See id.* at 147–48, 422 P.2d at 315–16.

348. *See id.* at 147, 422 P.2d at 316.

349. *See id.*

350. *See, e.g.*, RESTATEMENT (SECOND), *supra* note 6, § 71 comment a.

351. *Browning v. Johnson*, 70 Wash. 2d at 147–48, 422 P.2d at 316.

presence of detriment is enough.³⁵² Williston then defines detriment as "the giving up of 'something which immediately prior thereto the promisee was privileged to retain, or doing or refraining from doing something which he was then privileged not to do, or not to refrain from doing.'"³⁵³ This is virtually identical to the *Second Restatement's* definition of consideration, which manages to avoid any reference to benefit or detriment.³⁵⁴ Langenbach also makes clear that "legal" detriment is quite divorced from "whether there is any actual loss or detriment to [the promisee] or actual benefit to the promisor"³⁵⁵ Langenbach then explicitly ties this commitment to form to the court's inability to assess Browning's "objects and motives."³⁵⁶ Browning's subjective intention, and therefore the subjective value to him of Johnson's performance, are unavailable to the decisionmaker and therefore out of bounds.

So far Langenbach has attempted to legitimate as sufficient consideration a promise that has a real look of emptiness about it. He has stressed the "formality" of the consideration requirement, so that the the cancellation of the contract of sale can be of the necessary "form" regardless of its legal effect.³⁵⁷ But Langenbach also feels required to justify the decision as upholding an agreement that was indeed in Browning's interests at the time the deal was made. Langenbach's very emphasis on the difficulty of knowing Browning's objects and motives invites the reader to consider that Browning *might* have benefited from the agreement, despite its lack of legal significance.³⁵⁸ Then, shortly after renouncing any inquiry into Browning's objects and motives, Langenbach returns to reconstruct those same objects and motives. He uses the "form of bargain" entered into between the parties, and the absence of defects in the bargaining process, to reach the conclusion that the deal must have been beneficial to Browning. Thus form supports form.³⁵⁹

352. See *id.* at 148, 422 P.2d at 316 (quoting 1 S. WILLISTON, *supra* note 300, § 102 (3d ed. 1957)).

353. *Id.*, quoting 1 S. WILLISTON, *supra* note 300, § 102A (3d ed. 1957).

354. RESTATEMENT (SECOND), *supra* note 6, § 71(3) states, "The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation."

355. *Browning v. Johnson*, 70 Wash. 2d at 149, 422 P.2d at 316 (quoting *Harris v. Johnson*, 75 Wash. 291, 295, 134 P. 1048, 1050 (1913)).

356. 70 Wash. 2d at 149, 422 P.2d at 317 (quoting *Haigh v. Brooks*, 113 Eng. Rep. 119, 123 (Q.B. 1839)).

357. See 70 Wash. 2d at 149, 422 P.2d at 317. Langenbach also adds credibility to his argument by presenting the second agreement as a unilateral one. In this formulation, Browning promises to pay \$40,000 for Johnson's *act* of cancellation. This act seems more likely to qualify as consideration than would a promise by Johnson not to enforce a non-existent right, which would be the alternative way of characterizing the second agreement.

358. This is accentuated by the footnote Langenbach appends, which contains excerpts of a letter from Johnson to Browning, detailing why Browning is unwilling to go through with the sale. *Id.*

359. See *supra* note 357 and accompanying text.

The formal validity of the bargain allows Langenbach to hypothesize its substantively satisfying nature, and to invoke the adage that no man bargains against his own interest.³⁶⁰ Such treatment, however, begs the question, for it is certainly true that men, and women too, occasionally *act* against at least some conceptions of their interest. Whether there has been a *bargain* is the question for decision. That the transaction *looks* like a bargain is certainly enough to satisfy one aspect of consideration doctrine, but ignores the aspect that asks courts to distinguish the empty or illusory promise from the promise that counts as consideration.³⁶¹

In sum, then, *Browning* inquires into whether formal requirements have been met by moving from form to “substance as intent.” The persuasive manifestation of intent is the business-like form of the parties’ agreement. This form also provides reassuring evidence that the deal has subjective value to both parties, even if its objective value is somewhat obscure.

This strategy is identical to that found in cases such as *Wood v. Lucy, Lady Duff-Gordon*³⁶² involving agreements described by Kessler and Gilmore as being “instinct with obligation.”³⁶³ In *Lucy*, and like cases, the presence of an apparently serious agreement provides all the necessary proof that consideration is present. The consideration is then found; if it cannot be milked out of the express terms, it is readily implied.³⁶⁴

As *D.C. v. T.W.*³⁶⁵ illustrates, however, the presence of an apparently serious agreement is not always protection against a finding of no consideration. In that case, the mother and father of a child born out of wedlock entered into an “Agreement for Child Support”³⁶⁶ under which the father

360. Langenbach writes:

It is clear that at the time of contracting, the parties, equally informed, of equal bargaining power and equally assisted by able counsel, freely bargained for, and freely settled upon an exchange which each felt would be beneficial to him. Their mutual assent proved this mutual expectation of benefit for the law must presume that no man bargains against his own interest.

70 Wash. 2d at 151, 422 P.2d at 318. The judge’s emphasis on the equality and freedom of the parties surely has to do with his unease at awarding the plaintiff \$40,000 in return for his renunciation of non-existent rights.

361. The *Restatement* provides that release of an invalid claim may be consideration in only two situations: where the surrendering party believes the claim may fairly be determined to be valid (a situation dependent on the court’s knowledge of subjective intent), or where the surrendering party actually executes a written instrument to that effect (an arbitrary recognition of formality). *RESTATEMENT (SECOND)*, *supra* note 6, § 74.

362. *KESSLER & GILMORE, supra* note 8, at 362.

363. 222 N.Y. 88, 118 N.E. 214 (1917), *reprinted in* *KESSLER & GILMORE, supra* note 8, at 363.

364. 222 N.Y. at 90–92, 118 N.E. at 214–15. The courts’ treatment of requirements contracts also fits into this category. *See, e.g.,* *Lima Locomotive & Mach. Co. v. National Steel Castings Co.*, 155 F. 77 (6th Cir. 1907), *reprinted in* *KESSLER & GILMORE, supra* note 8, at 344; *In re United Cigar Stores Co. of America*, 8 F. Supp. 243 (S.D.N.Y. 1934), *reprinted in* *KESSLER & GILMORE, supra* note 8, at 348.

365. 480 S.W.2d 474 (Tex. Civ. App. 1972).

366. *Id.* at 476.

was to provide support to the child until it reached the age of majority or married, whichever came first. The agreement was signed and sworn to by both parties before a notary public, and included the statement that the minor child was the father's child, and that he was "therefore, and in consideration thereof, entering into the following support agreement."³⁶⁷ The mother agreed that the contract would be the basis of "all child support obligations" of "the father of my said child."³⁶⁸ At the time of the suit, the father was in default under the agreement to the extent of \$7,500, and claimed that the agreement lacked consideration. The trial court upheld the agreement and the father appealed.

Each step of Langenbach's analysis in *Browning*³⁶⁹ is transferable to *T.W.* There is again every indication that the agreement was entered into freely and equally by both parties, and that no defects in the bargaining process tainted its legitimacy. As in *Browning*, it could be asserted that the mutual assent proved the mutual expectation of benefit, and that any more particular investigation into the father's objects and motives was an inappropriate intrusion by the court into the world of subjective intent. Had the mother done something she was "then privileged not to do?"³⁷⁰ Yes, she had signed her name to the agreement, which acknowledged that the other party was the father of her child, and committed her to relinquishing any support claim not based on the agreement.

Unpersuaded by such reasoning, the Texas Court of Civil Appeals had no difficulty finding that the agreement lacked consideration and was unenforceable. Starting from the premise that consideration requires a finding either of benefit to the promisor or of detriment to the promisee, the court failed to find either.³⁷¹ Under 1972 Texas law, the father of an illegitimate child had no obligation to provide support;³⁷² the mother had legal custody of the child and the legal obligation to support it. By signing the agreement, the court reasoned, the mother was not taking on any responsibility beyond that required of her by law, and the father had not relieved himself of any legal obligation, since he had none.³⁷³ The agreement therefore neither benefited the father, nor resulted in detriment to the mother. Since the mother's was an empty promise, the agreement was unenforceable. The court considered it unimportant that this conclusion

367. *Id.*

368. *Id.*

369. See *supra* note 342.

370. 1 S. WILLISTON, *supra* note 300, § 102A, at 382 (3d ed. 1957), quoted in *Browning v. Johnson*, 70 Wash. 2d at 148, 422 P.2d at 316.

371. *D.C. v. T.W.*, 480 S.W.2d at 478.

372. *Id.*

373. *Id.*

contradicted the father's statement that his promise *was* supported by consideration. Formality is not all, the court said. The court investigated the recited consideration in light of undenied facts, and made a substantive decision that the recital was false.³⁷⁴

All the court has done here is draw upon a different set of possibilities created by the difficulty of sustaining a formal consideration doctrine. The absence of objective value was used to decide that consideration too was absent; the form of bargain was illusory; the promise named a condition but not a price. In this context, the seriousness of the parties' intent to contract, the evidentiary solemnity of signature before a notary, was all to no avail. To me, at least, this seems a repugnant and unnecessary result, but not an "incorrect" one under the current rules of the doctrinal game.³⁷⁵

C. *Consideration and Reliance, Sameness and Difference*

Our focus now shifts to the doctrine of reliance or promissory estoppel, conceived as an alternative basis for fixing liability, and therefore as a substitute for consideration in appropriate circumstances. To the extent that reliance rhetoric recognizes reliance as "substantive" rather than "formal," reliance can be viewed as an attempt to exorcise the substantive ghost from the law of consideration. In this view, reliance embodies the threat of a supplanting, substance-conscious doctrine, but at the same time contributes to the survival of formal consideration doctrine. To show how reliance ultimately fails in this rescue attempt, I analyze the relationship between *Restatement* section 71,³⁷⁶ which concerns consideration, and section 90,³⁷⁷ which concerns reliance, and discuss some illustrative cases. I then demonstrate that the relationship between these two sections is exactly mirrored in the relationship between *Second Restatement* sections 45³⁷⁸ and 87,³⁷⁹ which further illuminates the problematic co-existence of the models of consideration and reliance.

Because I suggest that consideration and reliance either are not, or need not be, as different from one another as they are generally perceived to be, a few caveats are in order. I do not mean to assert the insignificance of

374. *Id.* at 479.

375. *See, e.g.,* *Bernstein v. W.B. Mfg. Co.*, 238 Mass. 589, 131 N.E. 200 (1921), *reprinted in* *KESSLER & GILMORE, supra* note 8, at 375; *Reinert v. Lawson*, 113 S.W.2d 293 (Tex. Civ. App. 1938), *reprinted in* *KESSLER & GILMORE, supra* note 8, at 374.

376. *RESTATEMENT (SECOND)*, *supra* note 6, § 71.

377. *Id.* § 90.

378. *Id.* § 45.

379. *Id.* § 87.

either the appearance of liability based on detrimental reliance as a doctrine in its own right,³⁸⁰ or its appreciable increase in influence on the formulation of doctrine between, say, the *First* and *Second Restatement*.³⁸¹ In fact, it seems important to ask, if not possible to answer, questions about why our society has become so much more comfortable with a reliance-based rhetoric.

In a sense, I hope to contribute to the very inquiry I doubt we are in a position to conclude. Any theory of the emergence or resurgence of reliance as rhetoric must account for the fact that reliance rhetoric, as incorporated in doctrine, merely replicates, both internally and in dialogue with consideration rhetoric, a debate that was already central to, but internal to, consideration rhetoric. These tensions must be part of any finally satisfying story about the history and role of reliance in contract doctrine.

1. Second Restatement *Sections 71 and 90*

The historical story of detrimental reliance is that, as incorporated in the *First Restatement*,³⁸² it illustrates how the bargain theory of consideration failed to oust concrete notions of benefit and detriment from the common law of contract. As Gilmore tells the story,³⁸³ Corbin marshalled the body of case law recognizing the promisee's experienced detriment as a basis for enforcing the promisor's promise, and threw it in the teeth of bargain theory proponents. Confronted with this intractable material, Williston and his cohorts were forced to include the detrimental reliance principle in the *First Restatement* scheme, alongside bargain theory.³⁸⁴ Janus-like, these two heads of promissory liability stared out in different directions, barely acknowledging one another's existence. Neither text nor commentary addressed the knotty questions of how their coexistence should be imagined.

This problematic relationship continues in the text of the *Restatement*, although an attempt to "situate" the two ideas with respect to one another makes section 71 the cornerstone of the discussion of contracts based on consideration,³⁸⁵ while section 90 falls into the category of "Contracts

380. See, e.g., G. GILMORE, *supra* note 29, at 62-65.

381. See, e.g., *id.* at 69-72.

382. RESTATEMENT OF CONTRACTS § 90 (1932).

383. G. GILMORE, *supra* note 29, at 57-65.

384. *Id.* The bargain theory of consideration was originally encapsulated in RESTATEMENT OF CONTRACTS, *supra* note 382, § 75.

385. RESTATEMENT (SECOND), *supra* note 6, ch. 4, topic 1.

without Consideration.”³⁸⁶ This makes explicit the “exceptional” character of liability based on detrimental reliance.³⁸⁷ It also replicates the structure of the *First Restatement* in making it possible, indeed almost necessary, to talk about one section without talking about the other. The relationship between sections 71 and 90 is, however, close and critical: They do and must speak to and comment on one another.

For purposes of this discussion, the importance of section 71 lies in its requirement that a promise, to be enforceable, induce the furnishing of a consideration, which may be another promise, action, or forbearance. Section 71 further requires that the consideration reciprocally induce the making of the promise. Section 90, in contrast, provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.³⁸⁸

Under either section, a promise can be binding if it induces action or forbearance. The most obvious difference between the sections is the reciprocal or “bilateral” formulation of section 71, contrasted with the “unilateral” formulation of section 90.³⁸⁹ Under section 71, the consideration must induce the making of the promise and the promise must induce the consideration. This requires some interpretation. In the case of the promise for performance, which is the contractual mode most closely corresponding to liability for detrimental reliance, it is misleading to say that the performance induces the promise, since the promise temporally precedes the performance. A better formulation is that in these circumstances the promisor is induced, or appears to be induced, to promise by the *prospect* of performance.

While section 71 requires that the promisor manifest the intention of inducing action or forbearance, section 90 requires the promisor to conduct himself (manifest himself) in a fashion that he expects will induce the action or forbearance. Under what circumstances would the section 90

386. *Id.* ch. 4, topic 2.

387. The role of reliance doctrine is actually expanded in the *Restatement*, appearing not just in § 90, but also, for example, in connection with option contracts in § 87, and in connection with the Statute of Frauds in § 217. See, e.g., G. GILMORE, *supra* note 29, at 69–72, where Gilmore argues that detrimental reliance has “in effect, swallowed up the bargain principle . . .” *Id.* at 72.

388. RESTATEMENT (SECOND), *supra* note 6, § 90(1).

389. By this I mean, as the text which follows elucidates, that § 71 on its face asks us to conceive of the relationship between the parties as one of *mutual* inducement, while § 90 appears to require only that the promisee be induced by the promisor’s conduct.

requirement be met? Certainly where the promisee is persuaded, reasonably, that the promisor is calling for performance and has tied his promise to the prospect of performance.³⁹⁰ Under this circumstance, section 90 is no different from section 71; for all its unilateral formulation, section 90 has a hidden bilateral or reciprocal aspect.

Could the section 90 requirement be met under other circumstances as well? Not unless the promisee was justified in acting or forbearing, and the promisor had induced and should have expected the promisee's action or forbearance, even though the promisor was not calling for either and had not even used language or conduct that could reasonably be interpreted as calling for either. It is extremely difficult to imagine such a situation.³⁹¹

We are thus left with a conundrum: How can we distinguish the performance of section 90 from the consideration of section 71? First, we can distinguish the two situations by reference to the promisor's subjective intent. If the promisor subjectively desires or requests the performance called for, and is subjectively induced by the prospect of it to make his promise, then we are dealing with the consideration of section 71. If, on the other hand, the promisor's relationship to the performance is not one of subjective desire or request, then we are dealing with the performance of section 90.³⁹²

Second, we can distinguish the consideration of section 71 from the performance of section 90 on a substantive basis. If we imagine a content-based measure of consideration, such as benefit to the promisor, then actions and forbearances can theoretically be sorted according to whether they objectively benefit the promisor, and are therefore consideration, or merely result in detriment to the promisee, and are therefore not consideration.

The structure of the relationship between sections 71 and 90 therefore replicates the internal structure of consideration doctrine. Once again, a

390. By "calling for" action or forbearance I intend to suggest a manifestation that could be interpreted as "requesting" or "desiring" either the "performance" of § 71, which can in turn be either action or forbearance, or the action or forbearance required by § 90. The reason for making these distinctions, and using terms which encompass both, is made clear in the text that follows.

391. Such a situation would involve the promisor saying something like this: "I neither request nor desire you to do as I am suggesting, and my promise to you is in no way dependent on your doing as I suggest," and yet the promisee being justified in following the suggestion in reliance on the promise.

392. Conditions attached to gifts, or preparations for performance that are not themselves performance are presumably actions or forbearances not subjectively desired or even requested by the promisor, under this theory. But even to state this proposition is to render it vulnerable. *See supra* text accompanying notes 286-329.

distinct formal bargain theory of consideration turns out to be an impossibility unless reinforced by renegade notions of substance, substance as either subjective intent or objective value. Here, the rescuing notions of subjective intent and objective values are needed to hold apart the dominant world of bargain theory from the supplementary and residual world of liability for detrimental reliance.

To reiterate: To distinguish a section 90 situation of detrimental reliance from a section 71 bargain situation requires finding the absence of either the substance of subjective intent or the substance of objective value. How otherwise would we know how to characterize *Hoffman v. Red Owl Stores*,³⁹³ for example, as a reliance and not a consideration case? In *Hoffman*, Red Owl Stores wanted Mr. Hoffman to prepare to become a franchisee. In return for Hoffman's action, Red Owl Stores made their promises of support. Hoffman, in turn, was induced by Red Owl's promises to take the steps they demanded. We seem to have precisely the relationship of "reciprocal inducement" Holmes envisioned.³⁹⁴ What prevents this from being a consideration case is the court's sense that Red Owl Stores got nothing out of the steps taken by Hoffman (no objective value), or the sense that those preparatory steps, while suggested, were still not desired or requested by Red Owl Stores (no subjective intent).³⁹⁵ But if "absence" marks the section 90 reliance case, "presence" must mark the section 71 consideration case. From the perspective of section 90, then, consideration becomes a matter of substance and not of form.

2. *The Swallowing Relationship of Second Restatement Sections 71 and 90*

If section 71 requires the presence of substance and section 90 depends on the absence of substance, the next question is how doctrine can regulate the dividing line between cases where there is no liability without presence, and cases where there can be liability despite absence. Gilmore talks glancingly about this recurring problem of the contradictory character of consideration and reliance, about the way they must swallow up one another.³⁹⁶ I plan to show in some detail how this threat is constantly present in doctrinal discourse, and the particular forms that it takes. I then identify mechanisms that operate to prevent, finally, the collapse of consideration into reliance or vice versa. This last is the story of how what appears impossible is made possible.

393. 26 Wis. 2d 683, 133 N.W.2d 267 (1965), reprinted in KESSLER & GILMORE, *supra* note 8, at 171.

394. See O.W. HOLMES, *supra* note 225, at 230-32. See also *supra* text accompanying note 284.

395. See *Hoffman v. Red Owl Stores*, 26 Wis. 2d at 697-98, 133 N.W.2d at 274-75.

396. G. GILMORE, *supra* note 29, at 72.

What room does the doctrine of consideration, as either form or substance, leave for reliance? If consideration were taken seriously as a doctrine of substance, people would have no business relying on promises for which they had not paid. But if consideration is taken seriously as a doctrine of form, it would appear to cover all instances of detrimental reliance, making an additional doctrine of reliance unnecessary.

In *James Baird Co. v. Gimbel Bros.*,³⁹⁷ Judge Learned Hand suggested that section 90 could not be applied in the standard commercial contractual context, but only in the marginal areas of gift, charitable subscription, and the like.³⁹⁸ His point was a simple one. The theory of consideration imagines that offers unsupported by consideration are not binding promises. They become binding only when the performance or return promise has been received. It would therefore never be reasonable for an offeree to rely on an offer or treat it as a promise if he had not provided consideration. Thus, the conditions required by section 90—*reasonable* reliance on a *promise* unsupported by *consideration*—can never be met. Consideration has swallowed reliance.³⁹⁹

Hand's solution was skillful but ultimately illogical. He pushed the unwelcome section 90 off into a corner of contract-related law remote from the problem he was dealing with, namely the law of gift.⁴⁰⁰ But we can expose the fragility of this solution by applying his own reasoning to it. Under the law of gift, an unexecuted, undelivered gift—a mere gift promise—is not binding on the giver. Under these circumstances, how could the beneficiary ever rely, reasonably, on the promise? Reliance turns out to be incompatible with gift, just as it was incompatible with consideration.⁴⁰¹ If we took consideration doctrine seriously, then, we would not have room for section 90.⁴⁰²

397. 64 F.2d 344 (2d Cir. 1933), *reprinted in* KESSLER & GILMORE, *supra* note 8, at 246.

398. 64 F.2d at 346.

399. This swallowing argument can have either a private (intention-based) or a public (policy) formulation. In the private formulation, the unsupported promise cannot sustain reasonable reliance because people (promisors) actually intend not to be bound in the absence of consideration, and other people (promisees) know or should know that. *See, e.g., Baird*, 64 F.2d at 346. In the public formulation, reliance on unsupported promises contradicts our social commitment to wealth-enhancing transactions. *See, e.g., Prescott v. Jones*, 69 N.H. 305, 41 A. 352 (1898), *reprinted in* KESSLER & GILMORE, *supra* note 8, at 173. If we take seriously the intention-based argument about consideration, we cannot accept the *fact* of reliance. Actually, in giving reliance-based relief, judges tend to use the public argument about consideration—they accept the fact of reliance, and impose a policy exception to the policy of not enforcing promises without consideration. Interestingly, while this move reveals reliance as inevitably public, the fact that it also reveals consideration as public is lost sight of.

400. *Baird*, 64 F.2d at 346.

401. Saving arguments would have to stress either that the facts are different here—that people do in fact rely on gift promises in a way they do not rely on commercial-type promises—or that the policies are different. The factual argument seems hard to make, and the policy distinction threatens an unwarranted public intrusion.

402. This is different from the argument that if we took consideration seriously as a purely formal doctrine we would have no *need* for reliance. Under the latter argument, the apparent presence of

Deconstructing Contract Doctrine

Just as consideration swallows reliance, reliance swallows consideration. If we take seriously the idea of reliance as a basis for enforcing promises, it is hard to see why we would ever invoke the doctrine of consideration, even in situations where we currently think consideration would be found. This is most obviously true where the offeree has performed his part of the deal “in reliance” on the offeror’s promise. It is almost as obviously true where the offeree takes other concrete action on the basis of the paid-for promise of the offeror. The hardest case conceptually is that of the wholly executory contract, where the offeree, at the time of breach, was simply waiting without other obvious change of position for the time of performance.⁴⁰³ But even here the offeree is relying on the deal to the extent of not seeking another similar one, or by foregoing other opportunities in order to be able to follow through on this one.⁴⁰⁴

The next stage of our inquiry concerns how, given the tendency of these two doctrines to encroach upon and engulf one another, judges in fact apply doctrine so as to maintain each in its “proper” sphere. The initial

reciprocal inducement, as in *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), would also yield recovery under consideration theory without recourse to a supplemental reliance theory. *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891), reprinted in KESSLER & GILMORE, *supra* note 8, at 413, is another good example. This case was decided as a consideration case, but today is often recast as “really” a reliance case. Among the authorities cited for the result in that case is Pollock, who states precisely the reciprocal inducement theory: “Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.” 124 N.Y. at 546 (quoting F. POLLOCK, *PRINCIPLES OF CONTRACT* 167 (2d American ed. 1885)).

403. There are obvious parallels between this analysis and Fuller and Perdue’s analysis of the reliance interest in contract damages. Fuller & Perdue, *The Reliance Interest in Contract Damages*: 1, 46 YALE L.J. 52 (1936). They suggest, for example, that the restitution interest can generally be seen as a special case of the reliance interest, *id.* at 54–55, and that both interests present a stronger claim for vindication than the expectation interest, *id.* at 56–57.

404. Again, Fuller and Perdue offer a similar analysis when they suggest that “the reliance interest must be interpreted as at least potentially covering ‘gains prevented’ as well as ‘losses caused.’” *Id.* at 55. They take the further step of explaining expectation recovery as the measure that will serve to ensure recovery of all losses suffered in reliance:

[Expectation recovery] offers the measure of recovery most likely to reimburse the plaintiff for the (often very numerous and very difficult to prove) individual acts and forbearances which make up his total reliance on the contract. If we take into account “gains prevented” by reliance, that is, losses involved in foregoing the opportunity to enter other contracts, the notion that the rule protecting the expectancy is adopted as the most effective means of compensating for detrimental reliance seems not at all far-fetched.

Id. at 60.

A similar sensitivity to the potential range of reliance is indicated in *Hazlett v. First Fed. Sav. & Loan Ass’n.*, 14 Wash. 2d 124, 131, 127 P.2d 273, 277 (1942): “Surely, forbearance [in Section 90] was not intended to include the mere passive failure of the promisee to procure elsewhere, or by other means, the service or the thing promised. If so, it would be difficult to imagine a promise which would not be supported by some sort of ‘forbearance’ . . .”

When conjuring up those situations in which reliance is minimal, or the resultant damage apparently non-existent, it is well to remember that expectation damages for breach of contract are also occasionally non-existent; an example of a situation in which damages are inconsequential occurs when substitute goods are readily available at the same price, without extra incidental cost to the buyer. See, e.g., KESSLER & GILMORE, *supra* note 8, at 1042.

strategy is to view consideration as a doctrine of form, and reliance as a supplemental doctrine of substance. But because reliance reveals consideration as also a doctrine of substance,⁴⁰⁵ the work of maintaining the distinction between reliance and consideration must proceed at another level.

First, courts apply the doctrines sequentially; only if they find no consideration do courts invoke detrimental reliance.⁴⁰⁶ This ensures, however precariously, that consideration will not lose out to reliance. Contracts professors bemoan the common "error" of first-year students: Once introduced to detrimental reliance, they apply it indiscriminately, preferring it to the intricacies of consideration doctrine. According to my account, the first-year students' perception of the potential range of application of detrimental reliance doctrine is perfectly correct, although it flies in the face of the common law tradition, which protects consideration by insisting on its procedural priority.

Secondly, the doctrines differ in the measures of recovery generally associated with consideration and reliance cases.⁴⁰⁷ In fact, however, this distinction between reliance and consideration is relatively unimportant: While any detailed account of damages is beyond the scope of this piece, it is hardly novel to suggest that these supposed differences turn out to be fairly trivial in constraining damage awards in particular cases. While reliance recovery under section 90 may be "limited as justice requires,"⁴⁰⁸ nothing precludes the award of expectation damages, and there will of course be situations where reliance and expectation measures appear identical.⁴⁰⁹ Furthermore, since Fuller and Perdue's celebrated article, it has been accepted wisdom that damages for breach of contracts supported by consideration very often fall short of the expectation measure, and frequently appear to be based on the plaintiff's loss in reliance.⁴¹⁰ Certainly nothing in the *Second Restatement's* treatment of available damage measures imagines any rigid distinctions,⁴¹¹ and modern judicial practice appears to reflect the same flexibility.⁴¹² All of this suggests that the attempt

405. See *supra* text accompanying notes 392-395.

406. See, e.g., *Baird*, 64 F.2d at 346; *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413, 333 P.2d 757, 759 (1958). For the hornbook's treatment of reliance as a residual category, see sources cited in Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 686 n.41 (1984).

407. The traditional view, reflected in many contemporary texts, is that expectation damages should be awarded for the breach of contract supported by consideration, while reliance damages should be the limit of recovery for reliance cases. For a collection of such messages, see Feinman, *supra* note 406, at 686.

408. RESTATEMENT (SECOND), *supra* note 6, § 90(1).

409. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); see also Fuller & Perdue, *supra* note 403, at 73 (identifying three kinds of cases where reliance and expectation interests "will furnish identical, or nearly identical, measures of recovery. . .").

410. Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 373-417 (1937).

411. See RESTATEMENT (SECOND), *supra* note 6, §§ 346-56, 370-77.

412. See Feinman, *supra* note 406, at 687-88.

to distinguish bases of recovery by focusing on remedies is a deluded exercise in conceptualism.

Finally, its generally “unilateral” character⁴¹³ causes reliance rhetoric to sound different from consideration rhetoric. When the rhetoric of reliance explicitly recognizes the bilateral nature of the reliance relationship, however, reliance begins to appear indistinguishable from consideration.

*Drennan v. Star Paving*⁴¹⁴ is one of a group of bidding cases in which the subcontractor submits a bid to the general contractor, then wishes to withdraw it after the general contractor has used the bid in submitting a bid of its own.⁴¹⁵ At the time of the suit, the general contractor has either been awarded the contract, or is subject to penalty for withdrawing its bid. Justice Traynor, the author of the *Drennan* opinion, begins his analysis with a clear statement that consideration doctrine will not yield an irrevocable option making the subcontractor’s bid binding: “There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff’s use of its figures in computing his bid.”⁴¹⁶ Traynor finds that the subcontractor, nonetheless, did have reason to expect that the general contractor would use the bid and therefore had induced “‘action . . . of a definite and substantial character on the part of the promisee [the general contractor]’”⁴¹⁷ within the terms of section 90. This is enough in itself to support a finding for the general contractor.

Traynor goes on, however, to elaborate the reciprocal limitations under which the general contractor operates, once he is granted the general contract. The general contractor is not free to delay acceptance while he shops for a lower price. If he begins dickering with the subcontractor he loses his right to accept the subcontractor’s original bid.⁴¹⁸ Once Traynor has established this exchange of obligations, it seems less clear why they could not equally be conceived as an exchange of considerations, the subcontractor granting an option in return for the general contractor’s commitment to play fair. When Traynor also throws into the balance the fact that “[c]learly defendant [subcontractor] had a stake in plaintiff’s [general

413. See the explanation of “unilateral” offered *supra* note 389. This is not to say that unilateral consideration talk is not available; § 71 actually contains both models. The description of bargain as something “sought by the promisor . . . and given by the promisee . . .,” RESTATEMENT (SECOND), *supra* note 6, § 71(2), is unilateral, but the notions of “bargain,” *id.*, and “exchange,” *id.*, seem more bilateral. It is the general absence of “bilateral” reliance talk that is more striking.

414. 51 Cal. 2d 409, 333 P.2d 757 (1958).

415. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933), discussed *supra* at notes 397–402 and accompanying text, is another case in the same group.

416. *Drennan*, 51 Cal. 2d at 413, 333 P.2d at 759.

417. *Id.* (quoting § 90 of the RESTATEMENT OF CONTRACTS, *supra* note 382).

418. *Id.* at 415, 333 P.2d at 760.

contractor's] reliance on its bid,"⁴¹⁹ any sense of the boundaries between consideration and reliance vanishes.

3. *The Same Difference: Second Restatement Sections 45 and 87*⁴²⁰

Second Restatement section 45 treats the unilateral contract, the promise for performance which so closely resembles the situation covered by section 90.⁴²¹ Section 45 provides that:

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.⁴²²

As if underlining the close tie between section 90 and section 45, the commentary suggests that "[t]he rule of this Section is designed to protect the offeree in justifiable reliance on the offeror's promise, and the rule yields to a manifestation of intention which makes reliance unjustified."⁴²³ The section 45 option, however, is carefully distinguished from the situation in which only justifiable reliance warrants an imposition of liability on the promisor. The latter situation is governed instead by section 87 which, like section 90, falls under the topic of "Contracts without Consideration": "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."⁴²⁴ The question, therefore, is how to distinguish the performance or the

419. *Id.*

420. RESTATEMENT (SECOND), *supra* note 6, §§ 45, 87.

421. Section 45 has to be understood in relation to § 62. In the *Second Restatement*, unilateral contracts are of two kinds: those in which the promisor provides the opportunity for response by promise or performance, and those in which only performance will do. In the optional situation (§ 62) a choice by the promisee to tender or begin performance operates as a promise to complete performance, at which point the contract becomes one of promise for promise. Section 45 deals with the situation where the promisor demands performance only, and it operates to protect the promisee from the possibility that the promisor might retract his promise prior to the complete performance which can alone constitute acceptance.

422. RESTATEMENT (SECOND), *supra* note 6, § 45.

423. *Id.* § 45 comment b.

424. *Id.* § 87(2).

tender of performance that qualifies as consideration for section 45's option contract, from the action or forbearance that qualifies only as action in reliance under section 87.

As the commentary elaborates, section 45 envisions a distinction between performance and preparations for performance: "Beginning preparations, though they may be essential to carrying out the contract or to accepting the offer, is not enough. Preparations to perform may, however, constitute justifiable reliance sufficient to make the offeror's promise binding under § 87(2)."⁴²⁵

Why is this firm distinction drawn? A partial answer is that it is necessary to maintain the divide between contracts with and without consideration, or at least to reinforce that divide (precarious as the reinforcement may be), given the concession that section 45(1) is essentially reliance-based. This connection between consideration/no consideration and performance/preparations-for-performance is borne out as the commentary continues.

The commentary suggests several factors on which the distinction between preparing for performance and beginning performance may turn:

the extent to which the offeree's conduct is clearly referable to the offer, the definite and substantial character of that conduct, and the extent to which it is of actual or prospective benefit to the offeror rather than the offeree, as well as the terms of the communications between the parties, their prior course of dealing, and any relevant usages of trade.⁴²⁶

Those factors common to both sections 45 and 87—the referability of the conduct to the offer, and the definite and substantial character of the conduct—cannot be helpful in distinguishing the situations.⁴²⁷ We are then left with two types of suggestion which, not surprisingly, turn out to depend on the invocation of, respectively, objective value and subjective intent.

The invocation of objective value takes the form of the suggestion that conduct *beneficial to the offeror* will amount to performance or its equivalent, producing an option contract, while conduct that is not beneficial will at most provide a basis for reliance recovery, and constitute only preparation for performance.⁴²⁸ The invocation of subjective intent lies in

425. *Id.* § 45 comment f.

426. *Id.*

427. Presumably any action which the offer "does induce," in the language of § 87, is "referable to" the offer. Section 87(2) explicitly requires that the action or forbearance induced by the offer must be of a "substantial" character.

428. RESTATEMENT (SECOND), *supra* note 6, § 45 comment f.

the suggestion that the answer can be found in "the terms of the communication," or in other sources of intent such as the course of dealing or usages of trade.⁴²⁹ Thus, the tension between section 45 and 87(2) precisely replicates that between sections 71 and 90.

D. *Summary*

What does all of this go to show? Essentially that the area of contract doctrine we identify as being about consideration and reliance is in fundamental conflict over the question whether consideration should be viewed as a formal or a substantive requirement. Unlike the optimistic Fuller,⁴³⁰ I do not believe it is enough to say that the doctrine serves each of these admirable functions in appropriate situations; such optimism overlooks the way consideration-as-form can be appropriately invoked to produce a result that consideration-as-substance could be counted on to prevent in precisely the same factual setting. And vice versa. Once it is appreciated that consideration-based doctrines and reliance-based doctrines bear the same relationship to one another as consideration-as-form bears to consideration-as-substance, the area of doctrine afflicted with this particular variety of indeterminacy becomes even larger.

I suggest that the play between form and substance comes about because of our inability to recognize form without reference to substance, or to recognize substance without its embodiment in some form. But the recourse to substance is itself bifurcated in this body of material; sometimes the substance is that of subjective intent or desire, and sometimes that of objective value. Our earlier exploration of the world of intent leads us to understand this bifurcation as itself the expression of the difficulty we have divining intent without recourse to manifestation, as well as the threat to intention involved in measuring objective value without reference to individual desire.

The conventional need to view consideration as principally a formal requirement is a need of some urgency. It derives from the hope that, taken as form, consideration doctrine will be seen as more private than public, and that the state, in enforcing the doctrine, will not seem to be intervening in private bargains by making substantive judgments about what agreements are worthy of enforcement. Consideration doctrine, especially, shuns characterization as a mechanism for policing adequacy of exchange. In the inevitable move from form to substance, it is therefore

429. *Id.* The reference here is not directly to subjective intent, but rather to objectified intent, or intent as manifested. Nonetheless, essentially the same saving devices are in operation.

430. Fuller, *supra* note 31.

tempting to substitute the quintessentially private substance of private intent for the substance of objective value. But, as we have seen, the search for subjective intent in its manifested forms partakes of precisely those public aspects from which consideration doctrine hoped to extricate itself. Thus, our concern with form and substance, and manifestation and intent, are but particular expressions of our inability to resolve the tension between public and private, self and other.

IV. CONCLUSION:

DOCTRINE, THE COHABITATION CONTRACT, AND BEYOND

Doctrinal arguments cast in terms of public and private, manifestation and intent, and form and substance, continue to exert a stranglehold on our thinking about concrete contractual issues. By ordering the ways in which we perceive disputes, these arguments blind us to some aspects of what the disputes are actually about. By helping us categorize, they encourage us to simplify in a way that denies the complexity, and ambiguity, of human relationships. By offering us the false hope of definitive resolution, they allow us to escape the pain, and promise, of continual reassessment and accommodation.

In this final section, I will illustrate the poverty of traditional doctrinal arguments by examining the use of contract doctrine in recent cases involving the agreements of non-marital cohabitants. These opinions deploy many of the doctrinal maneuvers exposed in this Article. Distinctions between private and public realms, between contracts implied-in-fact and contracts implied-in-law, play an important part in the decisions. Interpretive questions and questions about the basis for enforcement—about consideration—also loom large, reiterating the concern with private and public, but couching that concern in the competing terms of subjective and objective, form and substance.

Significantly, the opinions largely ignore the aspect of the public-private debate that appears in contract doctrine as the set of rules governing duress and unconscionability. The concerns of those doctrines—preventing oppression of each party by the other, while preventing oppression of both by the state—are nonetheless highly relevant. For at the heart of these cases lies the problem of power. It is only because the exercise of power in this context is not seen as fitting the traditional rubrics of duress and unconscionability that courts are able to ignore and avoid it.

Once the convoluted play of doctrine in this area has been exposed, we can see that traditional doctrinal formulations are not the only means for understanding how and why decisionmakers reach their decisions. At this point, other inquiries become both possible and legitimate. In suggesting

what some of those other inquiries might be, my conclusion points toward possible ways of expanding our thinking about the issues of contract law.

A. *The Cases*

State courts have increasingly confronted cases involving various aspects of the cohabitation relationship, and their decisions have attracted a fair amount of scholarly attention.⁴³¹ I focus on two such decisions: that of the California Supreme Court in *Marvin v. Marvin*,⁴³² and that of the Illinois Supreme Court in *Hewitt v. Hewitt*.⁴³³

In *Marvin*,⁴³⁴ Justice Tobriner addressed the question of whether plaintiff Michelle Triola, who had lived with the defendant, Lee Marvin, for seven years, could recover support payments and half the property acquired in Lee Marvin's name over the course of the relationship. The court found that the plaintiff, in alleging an oral contract, had stated a cause of action in express contract, and further found that additional equitable theories of recovery might be applicable. On remand,⁴³⁵ the trial court found that there existed neither an express contract nor unjust enrichment, but awarded the plaintiff equitable relief in the nature of rehabilitative alimony.⁴³⁶ The court of appeals then struck this award on the theory that relief could be granted only on the basis of express contract or quasi-contract.⁴³⁷

The alleged oral agreement provided that plaintiff and defendant would, while they lived together, combine their efforts and earnings and share equally any property accumulated. They agreed to present themselves publicly as husband and wife. Triola also undertook to serve as the

431. For illustrative cases, see *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981); *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121 (Ct. Spec. App. 1982); *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981); see also Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1125 n.2 (1981) (collecting cases). For illustrative articles, see Blumberg, *supra*; Crutchfield, *Nonmarital Relationships and Their Impact on the Institution of Marriage and the Traditional Family Structure*, 19 J. FAM. L. 247 (1980-81); Deech, *The Case Against Legal Recognition of Cohabitation*, 29 INT'L & COMP. L.Q. 480 (1980); Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WISC. L. REV. 275; Case Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977).

432. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *Marvin* also generated a subsequent appeals court decision interesting in its own right. See *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

433. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). The lower appeals court opinion in *Hewitt*, 62 Ill. App. 3d 861, 380 N.E.2d 454 (1978) (reversing dismissal on grounds that public policy did not disfavor grant of mutually enforceable property rights to knowingly unmarried cohabitants in non-meretricious relationship), provides a perfect counterpoint to its supreme court successor.

434. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

435. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

436. *Id.* at 873-74, 176 Cal. Rptr. at 557-58 (reciting facts found by trial court).

437. *Id.* at 875-77, 176 Cal. Rptr. at 558-59.

defendant's companion, homemaker, housekeeper, and cook. A later alleged modification to the contract provided that Triola would give up her own career in order to provide these services; in return, Marvin promised to support Triola for the rest of her life. The relationship ended when Marvin threw Triola out.⁴³⁸

The plaintiff in *Hewitt* was in many respects a more sympathetic figure than Michele Triola. When she and Mr. Hewitt were both college students, she became pregnant. He then proposed that they live together as man and wife, presenting themselves as such to their families and friends, and that he thereafter share his life, future earnings, and property with her. She borrowed money from her family to put him through professional school, worked with him to establish his practice, bore him three children and raised them, and otherwise fulfilled the role of a traditional wife. After over fifteen years he left her. She sought an equal division of property acquired during the relationship and held either in joint tenancy or in the defendant's name.⁴³⁹

The appeals court ruled that she could have an equitable share of the property if she were able to prove her allegation of an express oral contract, although it did not preclude the possibility of alternative equitable theories of recovery in appropriate circumstances.⁴⁴⁰ The Supreme Court of Illinois reversed, basing its decision principally on considerations of public policy.⁴⁴¹

B. *Express and Implied Agreement*

The opinions in the cohabitation cases indicate that the distinction between the intention-based express contract and the public institution of quasi-contract may be central to the question of whether to grant relief. As I have earlier argued, however, techniques for interpreting the express contract are indistinguishable from techniques used to determine the presence of a quasi-contractual relationship. If the interpretive techniques employed highlight factors external to the parties and their actual intentions, even express contracts seem very public. If, in contrast, the techniques used have as their stated goal the determination of the parties' intentions, then quasi-contracts appear no less private or consensual than express contracts. The cohabitation opinions employ both public-sounding and private-sounding arguments to reach a variety of conclusions. In some cases courts determine that the parties are bound by *both* real and quasi-

438. *Marvin*, 18 Cal. 3d at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

439. *Hewitt*, 77 Ill. 2d at 52-54, 394 N.E.2d at 1205.

440. *Hewitt*, 62 Ill. App. 3d at 867, 380 N.E.2d at 459.

441. *Hewitt*, 77 Ill. 2d at 65-66, 394 N.E.2d at 1211 (effect of lower court's opinion would be to reinstate common law marriage after legislature had expressly abolished it).

contractual obligations, in others that they are bound by neither, in yet others that they are bound by one but not the other. The arguments do not determine these outcomes—they only legitimate them.

In these cases, as in the earlier-discussed *Hertzog*, there is a common presumption that agreements between intimates are not contractual.⁴⁴² While this model of association was developed in husband-wife and parent-child cases, non-marital cohabitants are assumed, for these purposes, to have the same kind of relationship.⁴⁴³ As in *Hertzog*, express words are taken to be words of commitment but not of contract,⁴⁴⁴ conduct that in other circumstances would give rise to an implied-in-fact contract is instead attributed to the relationship.⁴⁴⁵ These cases also reach a conclusion only intimated in *Hertzog*: They find no unjust enrichment where one party benefits the other.

One possible explanation for this presumption against finding contracts is that it accords with the parties' intentions. It can be argued that cohabitants generally neither want their agreements to have legal consequences, nor desire to be obligated to one another when they have stopped cohabitating.⁴⁴⁶ It can further be presented as a matter of fact that their services are freely given and taken within the context of an intimate relationship. If this is so, then a subsequent claim of unjust enrichment is simply unfounded.⁴⁴⁷

This intention-based explanation, however, coexists in the opinions—indeed sometimes coexists within a single opinion—with two other, more overtly public, explanations that rest on diametrically opposed public policies. The first suggests that the arena of intimate relationships is too private for court intervention through contract enforcement to be appropriate. In *Hewitt*, for example, the Illinois Supreme Court suggests that “the situation alleged here was not the kind of arm's length bargain

442. *Hertzog v. Hertzog*, 29 Pa. 465 (1857), discussed *supra* text accompanying notes 38–60; see also *Balfour v. Balfour*, [1919] 2 K.B. 571, reprinted in KESSLER & GILMORE, *supra* note 8, at 97.

443. See *Keene v. Keene*, 57 Cal. 2d 657, 668, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (1962).

444. See *Hertzog*, 29 Pa. at 470, discussed *supra* text accompanying notes 52–53.

445. *Id.* at 468–70, discussed *supra* text accompanying notes 52–53. Similarly, in *Balfour*, Lord Justice Duke stated:

It was said that a promise and an implied undertaking between strangers, such as the promise and implied undertaking alleged in this case would have founded an action on contract. That may be so, but it is impossible to disregard in this case what was the basis of the whole communications between the parties The basis of their communications was their relationship of husband and wife, a relationship which creates certain obligations, but not that which is here put in suit.

Balfour v. Balfour, [1919] 2 K.B. 571, 576 (Duke, L.J.).

446. Cf. *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943) (“Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage . . . are not present in such a case.”).

447. *Id.*, 134 P.2d at 763.

envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.”⁴⁴⁸

While it has some intuitive appeal, the argument that intimate relationships are too private for court enforcement is at odds with the more general argument that all contractual relationships are private and that contract enforcement merely facilitates the private relationships described by contract.⁴⁴⁹ To overcome this apparent inconsistency, we must imagine a scale of privateness on which business arrangements, while mostly private, are still not as private as intimate arrangements. But then the rescue attempt runs headlong into the other prevailing policy argument, which separates out intimate arrangements because of their peculiarly public and regulated status. Under this view, it is the business relationship that by and large remains more quintessentially private.

According to this second argument, the area of non-marital agreements is too public for judicial intervention. The legislature is the appropriate body to regulate such arrangements; courts may not help create private alternatives to the public scheme. In *Hewitt*, the supreme court directly follows its appeal to the intimate nature of the relationship with an acknowledgement of the regulated, and hence public, character of marriage-like relations.⁴⁵⁰ With respect to intimate relations conceived as public, the judiciary can then present itself as either passive or active. The argument for passivity is that judges should “stay out” of an arena already covered by public law. The argument for activity is that judges should reinforce public policy by deterring the formation of deviant relationships, either because they fall outside the legislative schemes organizing familial entitlement and property distribution,⁴⁵¹ or because they offend public morality.⁴⁵²

Neither the private nor the public arguments for the absence of contract in this setting are conclusive. Both private and public counterarguments are readily available. If the absence of contract is presented as flowing from party intention, competing interpretations of intention can be used to argue the presence of contract.⁴⁵³ If, within a more public framework, the court categorizes the concerns implicated by the relationship as private, then an argument can be made that within the boundaries expressly established by legislation, the parties should be free to vary the terms of their relationship without interference by the state.⁴⁵⁴ If the focus is the

448. *Hewitt*, 77 Ill. 2d at 61, 394 N.E.2d at 1209.

449. *See supra* text accompanying notes 26–34.

450. *Hewitt*, 77 Ill. 2d at 61, 394 N.E.2d at 1209.

451. *Id.* at 56–58, 394 N.E.2d at 1207–08.

452. *Id.* at 58–59, 394 N.E.2d at 1208.

453. *See infra* notes 457–458 and accompanying text.

454. *See, e.g., Hewitt*, 62 Ill. App. 3d at 863–66, 380 N.E.2d at 456–59 (accepting reasoning of

place of cohabitation agreements within the publicly-regulated sphere of intimate relationships, then an argument can be made that certain kinds of enforcement in fact extend and implement public policy rather than derogate from it.⁴⁵⁵

The availability of this range of intention-based and policy-based arguments makes possible virtually any decision. A court can find or not find a "real" contract. It can decide that enforcement of a real contract is or is not appropriate. It can decide that while real contracts should be enforced, there is no basis for awarding quasi-contractual relief in the absence of an expressed intention to be bound. It can decide that even in the absence of real contract, the restitutionary claim of the plaintiff represents a compelling basis for quasi-contractual relief. Further, the competing public and private strands of argument—each of which connects to both enforceability and non-enforceability arguments—can be used within the same opinion or other legal text, without the inconsistencies being so apparent as to undermine the credibility of the final result.

C. *Manifestation and Intent*

Some identifiable, particular patterns do emerge from this overall confusion of public and private arguments. As with all agreements, for example, every aspect of a cohabitation agreement raises interpretive questions that will drive a court to search for the elusive correspondence between subjective intent and manifested form. Even this most private exercise of contractual interpretation thereby opens the doors to the imposition of public values, norms, and understandings. Two interpretive issues in particular recur in the cases. The courts repeatedly consider how to evaluate the relationships out of which the agreements arise. They also repeatedly consider how to evaluate the role of sex in these relationships and in these agreements. This section explores the very different ways in which the opinions treat these issues, within the range of options made available by current doctrine.

Courts frequently invoke the context of cohabitation relationships to avoid enforcing agreements arising out of them. The argument here is essentially that even if such agreements use language of promise, or commitment, or reciprocal obligation, that language must be understood, *in*

Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976)), *rev'd* 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

455. See, e.g., *In re Marriage of Cary*, 34 Cal. App. 3d 345, 353, 109 Cal. Rptr. 862, 866 (1973) (court's holding that property should be divided between unmarried couple would not necessarily discourage marriages).

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the intimate context in which it is employed, as not involving any understanding that one party might use a court to enforce a duty forsaken, or a promise broken.⁴⁵⁶

In theory, if the parties make perfectly clear their intention to be legally bound by their agreement, then their intention governs.⁴⁵⁷ But this leaves open the question of when a court will find objective manifestations of such an intention to be bound. Will a written agreement be more susceptible to legal enforcement than an oral one? Will an agreement in which the reciprocal obligations relate to a particular piece of property or to a transaction that can be separated out, however artificially, from the affective context of the relationship convince a court that it has crossed the boundary between intimate unenforceability and business-like enforceability? These approaches all find some support in the cases,⁴⁵⁸ although their manipulability and their imperfect correspondence to questions of motivation and intention are obvious.

A second common theme employing notions of manifestation and intent is the specific role of sex in the parties' arrangement. The boundaries of this debate are set both by the tradition that precludes enforcement of prostitution contracts for reasons of public policy,⁴⁵⁹ and by the acknowledgement that even cohabiting parties may form valid contracts about independent matters.⁴⁶⁰ In the case of cohabitation agreements, the question therefore becomes whether the sex contemplated by the parties contaminates the entire agreement to the point where it is seen to fall within the model of the prostitution contract, or whether other features of the agreement can be seen as independent and enforceable.⁴⁶¹

Judges' differing interpretations of virtually identical agreements seem

456. See *supra* notes 442-47 and accompanying text.

457. See *Balfour*, [1919] 2 K.B. at 574 (Warrington, L.J.) ("It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made.").

458. For the suggestion that more weight has often been accorded a writing, see, for example, *Beal v. Beal*, 282 Or. 115, 122, 577 P.2d 507, 510 (1978). For a discussion of evidence of agreement about property distribution between unmarried cohabitants see, for example, *Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943):

Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. There is no evidence that the parties in the present case made any agreement concerning their property or property rights.

(citation omitted.)

This was the court's conclusion despite at least a three-year period of cohabitation during which the woman provided substantial services to the household. See *id.* at 686-87, 134 P.2d at 763-64 (Curtis, J., dissenting in part) (when woman contributes her services in the home, her interest in property accumulated should be protected).

459. See, e.g., *Marvin*, 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825 (contract to pay for sexual services would be unlawful).

460. See, e.g., *Hewitt*, 77 Ill. 2d at 59, 394 N.E.2d at 1208.

461. See, e.g., *id.* at 59-60, 394 N.E.2d at 1208-09.

to depend quite openly on either their views of what policy should prevail or their own moral sense. Rarely does a judge even appear to make a thorough attempt to understand and enforce what the parties had in mind. For Justice Underwood in *Hewitt*, for example, nothing but "naivete" could explain the assertion that "there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity."⁴⁶²

Justice Tobriner in *Marvin*, on the other hand, rejects the idea that the sexual relationship between parties to a cohabitation contract renders the contract as a whole invalid. He explicitly uses the divide between objective and subjective, form and substance, to carve out a much larger space for enforceable agreements than that envisaged by Underwood.⁴⁶³ Tobriner's test has two components: Contracts between non-marital partners are enforceable unless they *explicitly* rest "upon the immoral and illicit consideration of meretricious sexual services."⁴⁶⁴ Furthermore, such contracts are unenforceable only "*to the extent*" that they rest on this meretricious consideration.⁴⁶⁵

Tobriner is not so naive as to suppose that the Triola-Marvin agreement did not contemplate a sexual relationship. But he feels that the "subjective contemplation of the parties" is too "uncertain and unworkable" a standard.⁴⁶⁶ He relies instead on formal criteria of intent—on the manifestations of agreement alleged by Triola—to determine if his two-part test of enforceability has been met. For the purposes of this analysis Tobriner describes the agreement as follows: "[T]he parties agreed to pool their earnings, . . . they contracted to share equally in all property acquired, and . . . defendant agreed to support plaintiff."⁴⁶⁷ None of this

462. *Id.* at 60, 394 N.E.2d at 1209.

463. *Marvin*, 18 Cal. 3d at 672, 557 P.2d at 114-15, 134 Cal. Rptr. at 823-24.

464. *Id.* at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821.

465. *Id.*, 557 P.2d at 112, 134 Cal. Rptr. at 821 (emphasis in original). Severability as a device for rescuing the cohabitation agreement has proved popular. *See, e.g.*, *Rehak v. Mathis*, 239 Ga. 541, 544, 238 S.E.2d 81, 82-83 (1977) (Hill, J., dissenting); *Donovan v. Scuderi*, 51 Md. App. 217, 219, 443 A.2d 121, 123 (Ct. Spec. App. 1982).

466. *Marvin*, 18 Cal. 3d at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823.

467. *Id.* at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825.

Tobriner thus shifts his focus away from that involved in his two-part test. He moves from what the parties intended to what consideration the cohabitants provided to support their agreement. He says at one point: "By looking not to such uncertain tests, but only to the consideration underlying the agreement, we provide the parties and the courts with a practical guide to determine when an agreement between nonmarital partners should be enforced." *Id.* at 672, 557 P.2d at 114-15, 134 Cal. Rptr. at 823-24. And in concluding this analysis, he says again: "So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose . . ." *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

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strikes Tobriner as necessitating a conclusion that sex invalidates the agreement.⁴⁶⁸

Of course the formal criteria are themselves empty of significance until given meaning by judicial analysis. The very same language construed by Tobriner had been given very different effect in an earlier decision. In *Updeck v. Samuel*, a California District Court of Appeal considered the statement that the woman would make a permanent home for the man and be his companion as indicating precisely the sexual character of the relationship.⁴⁶⁹ Unwilling or unable to disapprove *Updeck*, Tobriner is forced to distinguish this case in a fashion that directly undercuts the legitimacy of his stated reliance on form or manifestation. He argues that the *Updeck* agreement was found invalid because the Court “[v]iew[ed] the contract as calling for adultery.”⁴⁷⁰ But the very act of “viewing” the contract, or interpreting its terms, involves an explanation of substance. The court in *Updeck* supplied sexual substance, while Tobriner supplies economic substance.⁴⁷¹ *Jones v. Daly*,⁴⁷² a case subsequent to *Marvin*, provides another striking illustration of the manipulability of form. In *Jones*, which involved a homosexual partnership, a California Court of Appeal denied relief on the ground that an agreement, in other respects almost identical to the *Marvin* agreement, contained the word “lover.”⁴⁷³

468. *Id.*, 557 P.2d at 116, 134 Cal. Rptr. at 825.

469. *Updeck v. Samuel*, 123 Cal. App. 2d 264, 267, 266 P.2d 822, 824 (Dist. Ct. App. 1954) (finding oral contract based on immoral consideration where both parties legally married to other spouses).

470. *Marvin*, 18 Cal. 3d at 671, 557 P.2d at 114, 134 Cal. Rptr. at 823. In *Marvin*, as in *Updeck*, the defendant was legally married to another spouse during at least a portion of the term of his contract with the plaintiff. *Id.* at 667, 557 P.2d at 111, 134 Cal. Rptr. at 820.

471. The one case Tobriner feels compelled to disapprove rather than distinguish is that of *Heaps v. Toy*, 54 Cal. App. 2d 178, 128 P.2d 813 (Dist. Ct. App. 1942). See *Marvin*, 18 Cal. 3d at 671 n.6, 557 P.2d at 114 n.6, 134 Cal. Rptr. at 823 n.6. In *Heaps*, the court found “contrary to good morals” an agreement under which the woman was to leave her job, refrain from marriage, be a companion to the man and make a permanent home for him, in return for economic support for herself and her child. Tobriner seems to feel that even interpretation must have its limits, and that the *Heaps* court overstepped its limits by reading immorality into this form of agreement.

472. 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (Ct. App. 1981)

473. The court in *Jones v. Daly* stated, “These allegations clearly show that plaintiff’s rendition of sexual services to Daly was an inseparable part of the consideration for the ‘cohabitators’ agreement,” and indeed was the predominant consideration.” *Id.* at 508, 176 Cal. Rptr. at 133. In response to the plaintiff’s claim that neither the word “cohabitation,” under California law, nor the word “lover,” according to Webster’s Dictionary, inevitably describes a sexual relationship, the court ruled that “[v]iewed in the context of the complaint as a whole, the words . . . do not have the innocuous meanings which plaintiff ascribes to them. These terms can pertain only to plaintiff’s rendition of sexual services to Daly.” *Id.*, 176 Cal. Rptr. at 133.

This determination is plainly dependent upon the provision of sexual substance to the form of the agreement, although the court also relies upon arguments of form in finding that the sex cannot be severed from the rest of the agreement: “Neither the property sharing nor the support provision of the agreement rests upon plaintiff’s acting as Daly’s traveling companion, housekeeper or cook as distinguished from acting as his lover.” *Id.* at 509, 176 Cal. Rptr. at 134. Exactly the same could be said, of course, about the agreement at issue in *Marvin*, although the *Jones* court is using the argument to distinguish the case from *Marvin*.

As the courts wrestle with these interpretive questions, we see them apparently infusing a public element, external to the parties' own view of their situation, into their assessment of cohabitation agreements. We also can see how this is a necessary result of the tension between manifestation and intent, of the way in which intent requires embodiment in manifested forms, even while the forms require an infusion of substance before they can yield meaning. Indeed, to accuse judges of moving from the private to the public sphere is only to accuse them of the inevitable. If there is force behind the accusation, it is not *that* they have made the transition from private to public, but that they have made the transition *un-self-consciously*, and that the particular values, norms, and understandings they incorporate are different from the ones we would have favored, or different from the ones we think would correspond with those of one or both of the parties to the agreement.

D. *Consideration: Its Substance*

Consideration doctrine offers yet other opportunities for the conflation of public and private, and the introduction of competing values, norms, and understandings into the resolution of these cohabitation cases. Just as in the area of interpretation, the crucial additions are judicial conceptions of sexuality, and of woman's role in her relationship with man. Two aspects of consideration doctrine recur in the cases. Each illustrates the proposition that formal consideration doctrine cannot be implemented without recourse to substance. Substance, here as elsewhere, can be provided by assessments of objective value or by investigations into subjective intent. It is with respect to these substantive inquiries that ideas about sexuality and relationship come to play so potentially important a part.

The first use of consideration doctrine in this context shows up in the disinclination of courts to enforce contracts based on "meretricious" consideration.⁴⁷⁴ Courts frequently search beyond the express language of the

In *Donovan v. Scuderi*, 51 Md. App. 217, 443 A.2d 121 (Ct. Spec. App. 1982), the trial court said that the agreement in question was made for no "reason other than the promotion of [the parties'] meretricious relationship," *id.* at 221, 443 A.2d at 124 (quoting trial court), while the court of appeals found the agreement "only remotely related" to sex between the parties. *Id.* at 224, 443 A.2d at 125. In *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977), the complaint alleged that the appellant "'cooked for, cleaned for, and in general cared for the comforts, needs, and pleasures of the [appellee].'" *Id.* at 541-42, 238 S.E.2d at 81 (emphasis in original). While the emphasis on pleasures is in the original, it seems safe to assume that it is supplied by the opinion writer. As the dissent points out:

This court has simply presumed that sex was agreed to. We will not guess at the terms of contracts in other cases but here we knowingly imagine what the terms of this agreement were.

In my opinion we should not use conjecture to imagine what the parties agreed to do.

Id. at 544, 238 S.E.2d at 83 (Hill, J., dissenting).

474. See, e.g., *Hill v. Estate of Westbrook*, 95 Cal. App. 2d 599, 603, 213 P.2d 727, 730 (Dist. Ct. App. 1950); *Rehak v. Mathis*, 239 Ga. at 543, 238 S.E.2d at 82; *Hewitt v. Hewitt*, 77 Ill. 2d at

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agreement in order to “find” that sex is at the heart of the deal—specifically that the woman is providing sexual services in return for the economic security promised by the man.⁴⁷⁵ Insofar as this investigation depends on divining what the parties had in mind, consideration turns on subjective intent. For these purposes, it matters not at all that “intent” has been derived from the judge’s own feelings about such relationships, even when the express language of the parties would appear to point in an opposite direction.

The treatment of meretricious consideration also illustrates how consideration may depend on a finding of objective value. When courts refuse to enforce contracts based on the exchange of sexual services for money, they are, for long-standing policy reasons, declining to recognize sexual services as having the *kind* of value that they will honor. This decision, based on an objective measure of value, is no different from the decision that “nominal” consideration will not support a contract.⁴⁷⁶ There, too, courts disregard intention in the name of a policy that depends upon societal recognition of certain sorts of values and delegitimation of others.

The second aspect of consideration doctrine of interest in this context is the traditional conclusion that the woman’s domestic services cannot provide consideration for the promises made to her by the man. This is usually linked to the idea that the relationship itself is not one the parties see as having a legal aspect. The standard explanation is that the woman did not act in expectation of gain, but rather out of affection, or that she intended her action as a gift.⁴⁷⁷

Tobriner in the *Marvin* decision rejects this conclusion by recasting the issue as one properly belonging in the selfish world of business.⁴⁷⁸ Unless

58–59, 394 N.E.2d at 1208; *Donovan v. Scuderi*, 51 Md. App. at 219, 443 A.2d at 123.

475. See *supra* notes 462–71 and accompanying text. The traditional assumptions about the nature of the exchange are at once highlighted and challenged by this comment from the dissenting judge in *Rehak*:

[W]here a man and woman have contracted with each other to cohabit together illegally, a court will not require the woman to perform her promise nor will it require the man to pay for her services. However, where a man hires a maid to clean house for him, his obligation to pay wages is enforceable in court even though he seduces her. . . . I do not find evidence that the female in this case agreed to make house payments in consideration of the male’s promise to seduce her or to cohabit with her illegally.

239 Ga. at 544, 238 S.E.2d at 83 (Hill, J., dissenting).

476. See RESTATEMENT (SECOND), *supra* note 6, § 71 comment b; see also text accompanying notes 309–314 (discussing *Restatement’s* treatment of consideration).

477. See, e.g., *Roznowski v. Bozyk*, 73 Mich. App. 405, 408–09, 251 N.W.2d 606, 608 (1977) (in “family relationship,” absent “proof of the expectations of the parties, the presumption of gratuity will overcome the usual contract implied by law to pay for what is accepted”); *Cropsey v. Sweeney*, 27 Barb. 310, 315 (N.Y. App. Div. 1858): “[T]hese services were performed not as a servant, with a view to pay, but from higher and holier motives”; *Roberts v. Roberts*, 64 Wyo. 433, 450, 196 P.2d 361, 367 (1948) (“[T]he relationship as husband and wife negative[s] that of master and servant”) (quoting *Willis v. Willis*, 48 Wyo. 403, 437, 49 P.2d 670, 681 (1935)).

478. *Marvin v. Marvin*, 18 Cal. 3d. 660, 670 n.5, 557 P.2d 106, 113 n.5, 134 Cal. Rptr. 815, 822

homemaking services are considered lawful and adequate consideration for a promise to pay wages, the entire domestic service industry will founder.⁴⁷⁹ Just as plainly, such services can provide the consideration for an agreement concerning property distribution.⁴⁸⁰ Tobriner thus appeals to the substance of objective value: There is a market in which domestic services receive a price; when intimates arrange that one will deliver those same services to the other, that promise is therefore capable of supporting a return promise.

Even as Tobriner uses ideas of objective value, however, his reasoning reveals that the ultimate rationale for this aspect of consideration doctrine depends upon arguments of subjective intent. Like the promise in the *Michigan* case,⁴⁸¹ the services could constitute consideration if they were offered with the intention of bargain or exchange. It is only the altruistic context, revealing the beneficent intention, which invalidates them.⁴⁸²

Thus, while one route of access into this issue threatens to expose the public determination of what values the law will and will not recognize, that route is apparently closed off by the reminder that it is private intention, not public power, that assigns value. But then the very public role abjured in the context of objective value is played out instead through the "finding" of intent according to criteria that are essentially and inevitably public rather than private.

E. *The Question of Power*

Under duress and unconscionability doctrines, policing the "fair" exchange is tied irretrievably to asking whether each party entered into the contract freely, whether each was able to bargain in equally unconstrained ways, and whether the deal was a fair one.⁴⁸³ I suppose that any of us

n.5 (1976).

479. *Id.*

480. *Id.* at 679, 557 P.2d at 119, 134 Cal. Rptr. at 828 (citing *Vallera v. Vallera*, 21 Cal. 2d 681, 686-87, 134 P.2d 761, 763-64 (1943) (Curtis, J., dissenting)).

481. *Wisconsin & Mich. Ry. Co. v. Powers*, 191 U.S. 379 (1903). See discussion *supra* text accompanying notes 287-297.

482. There is a subtheme in some of the cases, however, suggesting that in fact homemaking services are of little objective value. In *Kinnison v. Kinnison*, 627 P.2d 594, 596 (Wyo. 1981), where the parties entered a settlement agreement based on the woman's provision of services in improving a property and managing and maintaining a household, the court stated: "A contract made in settlement of claims is valid even if the claims settled are of doubtful worth." (citations omitted).

Another suggestion, dependent on measures of objective value rather than subjective intent, is that even if the woman's services are not disqualified from counting as consideration by the beneficent intention with which they are provided, they are "balanced out" by the companionship and services provided by the man. This appears to be the reasoning of the trial court in the second *Marvin* decision, in determining that Lee Marvin was not unjustly enriched by his relationship with Michelle Triola. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 874, 176 Cal. Rptr. 555, 557 (1981) (court of appeals' statement of facts taken from findings of trial court).

483. In asking these questions, we examine the substance of the deal (according to inevitably

would find these questions even harder to answer in the context of intimate relationships than in other contexts—harder in that we would require a much more detailed account of the particulars before we could hazard an opinion, and harder in that even this wealth of detail would be likely to yield contradictory interpretations. Yet we acknowledge the importance of these questions in the area of intimate relations; we do not imagine either that most couples wind up with a fair exchange, or that most couples have equal bargaining power vis-à-vis one another.⁴⁸⁴

The doctrinal treatment of cohabitation agreements, however, like the treatment of contracts in general, usually pays little attention to questions of power and fairness. Duress and unconscionability are the exceptions that prove the rule. Those doctrines identify the only recognized deviations from the supposedly standard case of equal contracting partners. Intimate partners are conceived of as fitting the standard model. One consequence of this conception is that courts can justify the failure to enforce cohabitation arrangements as mere nonintervention, overlooking the fact that the superior position in which nonaction tends to leave the male partner is at least in part a product of the legal system.⁴⁸⁵ Another is that courts can idealize the private world in which their “nonintervention” leaves the parties, disregarding the ways in which that world is characterized by inequality and the exercise of private power.⁴⁸⁶ Yet another is that courts can talk blithely about the intentions of “the parties” in a fashion that ignores the possibility that one party’s intentions are being respected at the expense of the other’s.⁴⁸⁷

suspect measures of equivalence); the behavior of the parties (according to equally suspect standards of good behavior); or the state of mind of the parties (asking questions that lead us back to other evidence of those states of mind, like the outcome of the deal or the behavior of the parties).

484. Our talk about relationship in nonlegal contexts certainly deals at length and in depth with these issues, as we ponder, for example, why relationships are formed and why they fall apart, or what motivates particular decisions within intimate relationships.

485. See, e.g., Taub & Schneider, *Perspectives on Women’s Subordination and the Role of Law*, in *THE POLITICS OF LAW*, *supra* note 11, at 117, & especially 118–24; cf. Hale, *supra* note 100, at 471–74 (legal system places one of contracting parties in superior position by imposing legal duty on other party); see also *supra* notes 104–06 and accompanying text.

486. Taub & Schneider, *supra* note 485, at 122; cf. *Coppage v. Kansas*, 236 U.S. 1, 15 (1915) (discussing employer-employee relationship); *supra* text accompanying notes 96–103 (discussing *Coppage*).

487. For a thoughtful account that still posits a single contractual intention, shared by both parties, see the California Supreme Court opinion in *Marvin v. Marvin*, 18 Cal. 3d 660, 675 n.11, 557 P.2d 106, 117 n.11, 134 Cal. Rptr. 815, 826 n.11 (1976). Commenting on the second trial court’s award, on remand, of rehabilitative alimony, the second opinion of the appeals court challenges that supposition: “[T]here is nothing in the trial court’s findings to suggest that such an award is warranted to protect the expectations of both parties.” *Marvin v. Marvin*, 122 Cal. App. 3d 871, 876, 176 Cal. Rptr. 555, 558 (emphasis in original) (1981). See also *Beal v. Beal*, 282 Or. 115, 126 n.2, 577 P.2d 507, 512 n.2 (1978) (emphasis in original):

In fact, whatever else may be true of the intentions and expectations of unmarried couples (if these are shared at all) the one thing that may often be inferred with some certainty is that they have chosen *not* to be married and to place themselves within the legal consequences of

Not all of the cohabitation contract opinions ignore the issues of fairness and power. They are more likely to receive explicit attention when a judge frankly invokes "public policy" instead of relying exclusively on contract doctrine. They appear, for example, when the Illinois appeals court in *Hewitt* explains why enforcement of such agreements promotes rather than undermines the institution of marriage.⁴⁸⁸ When a judge casts his opinion in traditional doctrinal terms, using intention, for example, or consideration, then any sensitivity he has to questions of power and fairness must be translated—translated, for example, into a willingness to assume that the parties did intend to enter a relationship of reciprocal obligation or that the woman has provided services that require compensation.⁴⁸⁹ Frequently this involves construing the male partner's intentions *as if* he were the concerned and equal partner the law assumes him to be.⁴⁹⁰ Again, these devices parallel those used by courts across the range of contract decisions. But only when judges move outside the framework of traditional contract doctrine will they be in a position to grapple with the full range of problems posed by these disputes.

There are several ways to begin a richer examination of the cohabitation cases. First, we can learn from the truths underlying contract doctrine while rejecting the idea that that doctrine alone can lead us to correct answers. The dichotomies of public and private, manifestation and intent, form and substance, do touch on troubling questions that are central to our understanding of intimate relationships and the role of the state in undermining or supporting them. The problem with doctrinal rhetoric is twofold. First, it recasts our concerns in a way that distances us from our

that relationship.

488. The court stated:

The value of a stable marriage remains unchallenged and is not denigrated by this opinion. It is not realistic to conclude that this determination will "discourage" marriage for the rule for which defendant contends can only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings which he may acquire. One cannot earnestly advocate such a policy.

Hewitt v. Hewitt, 62 Ill. App. 3d 861, 868-69, 380 N.E.2d 454, 460 (1978).

489. See, e.g., *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32.

490. *Id.* at 683, 557 P.2d at 121, 134 Cal. Rptr. at 830 (suggesting presumption "'that the parties intended to deal fairly with each other'" (quoting *Keene v. Keene*, 57 Cal. 2d 657, 674, 371 P.2d 329, 339, 21 Cal. Rptr. 593, 603 (1962) (Peters, J., dissenting))). This is essentially the tactic challenged by the second opinion of the appeals court in *Marvin*, 122 Cal. App. 3d at 876-77, 176 Cal. Rptr. at 559; see also *Kozlowski v. Kozlowski*, 80 N.J. 378, 390-91, 403 A.2d 902, 909 (1979) (Pashman, J., concurring) (supporting presumption of fair dealing); *Carlson v. Olson*, 256 N.W.2d 249, 255 (Minn. 1977):

The trial court found that the parties had lived together for over 21 years, had raised a son to maturity, and had held themselves out to the public as husband and wife. The home and some personal property were in joint tenancy. Thus, the trial court was justified in finding that on all the facts of this particular case the parties intended that their modest accumulations were to be divided on an equal basis

lived experience of them. Second, the resolution of the cases that the application of doctrine purports to secure offers us a false assurance that our concerns can be met—that public can be reconciled with private, manifestation with intent, form with substance.

Once we realize that doctrinal “resolutions” are achieved only by sleight of hand, consideration of the identified dichotomies helps us to explore more fully the cohabitation agreement. What is the nature of this relationship, or what range of cohabitation arrangements precludes us from making general statements about the nature of the relationship? To what extent do these relationships need protection from authority, and to what extent do they require nurturing by authority? To what extent do they reflect the shared expectations of their participants, and to what extent the imposition of terms by one party on another? How can we harbor intimacy within institutions that offer the flexibility to accommodate individual need, while at the same time providing a measure of predictability and stability? What stake does the society have in limiting the forms of association it will recognize? Given our dependence on our social and cultural context, what freedom does any of us have to reimagine the terms of human association?

Study of the play between public and private, objective and subjective, shows us that these same dichotomies organize not only the strictly doctrinal territory of contract interpretation or consideration, but also the broader “policy” issues that are folded into the cases. Questions of judicial competence, for example, turn out to involve precisely the question of whether a private sphere can be marked off from the public sphere.⁴⁹¹ Similarly, whether enforcement of cohabitation agreements is a pro-marriage or an anti-marriage position turns out to depend on questions of intention and power.⁴⁹² Even as this analysis illuminates the policy dimension of the cases, it refutes the claim that the addition of policy considerations can cure doctrinal indeterminacy.

491. The Supreme Court of Illinois in the *Hewitt* case used the traditional argument that policy in this area should be left to the legislature—that the judiciary should stay out of “public policy in the domestic relations field.” *Hewitt*, 77 Ill. 2d at 61, 394 N.E.2d at 1209 (citations omitted). The appeals court doubted the validity of the distinction between intervention and nonintervention, or “public” enforcement of the agreement, and “private” nonenforcement:

[A]lthough the courts proclaim that they will have nothing to do with such matters, the proclamation in itself establishes, as to the parties involved, an effective and binding rule of law which tends to operate purely by accident or perhaps by reason of the cunning, anticipatory designs of just one of the parties.

Hewitt, 62 Ill. App. 3d at 867, 380 N.E.2d at 459 (quoting *West v. Knowles*, 50 Wash. 2d 311, 316, 311 P.2d 689, 693 (1957)).

492. The appeals court in *Hewitt* thought that *not* enforcing agreements of this sort would encourage the income-producing party to avoid marriage, and favor the cunning. See *supra* notes 488, 491. The supreme court said: “We cannot confidently say that judicial recognition of property rights between unmarried cohabitants will not make that alternative to marriage more attractive by allowing the parties to engage in such relationships with greater security.” *Hewitt*, 77 Ill. 2d at 61–62, 394

If neither doctrine nor the addition of policy can determine how decisionmakers choose outcomes in particular cases, the next question is whether the opinions contain other material that illuminates the decision-making process. The dimension of these cohabitation cases that cries out for investigation is the images they contain of women, and of relationship. And since images of women and of relationship are the central concern of feminist theory, I have used that theory as the basis for my enquiry. This does not, of course, foreclose the possibility that other enquiries, in this or other settings, might prove equally possible and promising once doctrine is opened up to make room for them.

I am not claiming that judges decide cohabitation cases on the basis of deeply held notions about women and relationship in the sense that these notions provide a determinate basis for decision. For this to be true, attitudes toward women and relationship would have to be free from contradiction in a way that doctrine and policy are not. I believe instead that these notions involve the same perceived divide between self and other that characterizes doctrine, and are as internally contradictory as any doctrine studied in this Article. My claim, therefore, is only that notions of women and relationship are another source of influence, and are therefore as deserving of attention as any other dimension of the opinions. These notions influence how judges frame rule-talk and policy-talk; in a world of indeterminacy they provide one more set of variables that may persuade a judge to decide a case one way or another, albeit in ways we cannot predict with any certainty.

One introductory caveat is in order. To say that "the opinions" convey images of woman and relationship is to miss the distinction between images that appear to inhere in the doctrine as it has developed, and images woven into the texture of opinions seemingly at the initiative of a particular judge. I think this distinction is worth noting, even though in practice it cannot always be made. It becomes clearest, perhaps, when a judge struggles *against* images he sees embedded in the doctrine, and offers new images that in turn provide him with new doctrinal choices.⁴⁹³

One powerful pair of contradictory images of woman paints the female cohabitant as either an angel or a whore. As angel, she ministers to her male partner out of noble emotions of love and self-sacrifice, with no thought of personal gain.⁴⁹⁴ It would demean both her services and the

N.E.2d at 1209.

493. Justice Tobriner does this consistently in his opinion in *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

494. See, e.g., *Cropsey v. Sweeney*, 27 Barb. 310, 314-15 (N.Y. App. Div. 1858) ("[H]er long, devoted, faithful love, and services, as a *wife* and *mother*, will not permit us to say that she is legally entitled to receive pay for those services *as a servant*." (emphasis in original)); *Roberts v. Roberts*, 64 Wyo. 433, 450, 196 P.2d 361, 367 (1948) ("[T]he relationship as husband and wife negatives[s] that

spirit in which they were offered to imagine that she expected a return—it would make her a servant.⁴⁹⁵ As whore, she lures the man into extravagant promises with the bait of her sexuality—and is appropriately punished for *her* immorality when the court declines to hold her partner to his agreement.⁴⁹⁶

Although the image of the whore is of a woman who at one level is seeking to satiate her own lust, sex—in these cases—is traditionally presented as something women give to men. This is consistent both with the view of woman as angel, and with the different image of the whore as someone who trades sex for money. In either event, woman is a provider, not a partner in enjoyment.⁴⁹⁷ When a judge invokes this image, he supports the view that sex contaminates the entire agreement, and that the desire for sex is the only reason for the male partner's promises of economic support. If sex were viewed as a mutually satisfying element of the arrangement, it could be readily separated out from the rest of the agreement. In most cases, the woman's career sacrifices and childrearing and homemaking responsibilities would then provide the consideration for the economic support proffered by the man.

Marriage is often presented in the cases as the only way in which men and women can express a continuing commitment to one another.⁴⁹⁸ This suggests that when men do not marry women, they intend to avoid all

of master and servant” (citation to *Stewart v. Waterman*, 97 Vt. 408, 414, 123 A. 524, 526 (1924), in *Willis v. Willis*, 48 Wyo. 403, 437, 49 P.2d 670, 681 (1935)).

495. “The law would do injustice to the plaintiff herself, by implying a promise to pay for these services; and respect for the plaintiff herself, as well as for the law, compels us to [deny her relief].” *Cropsey v. Sweeney*, 27 Barb. at 315.

496. “From plaintiff's own lips and from her own petition, the court was informed that she and the defendant lived together or cohabited together without the benefit of marriage and in this court's judgment she ‘committed iniquity’ and the court concludes that her action ‘arises out of an immoral transaction.’” *Roach v. Buttons*, 6 FAM. L. REP. (BNA) 2355 (Tenn. Ch. Ct. Feb. 29, 1980) (quoting Q. POMEROY, A TREATISE ON EQUITY JURISDICTION §§ 397–404, at 737–61 (4th ed. 1918)). That her partner has equally participated in immoral conduct but is rewarded by a decision not to enforce the agreement is simply irrelevant. *See, e.g., Kinnison v. Kinnison*, 627 P.2d 594, 596, 599 (Wyo. 1981) (Rooney, J., dissenting).

497. The point is not that courts ruminates openly about the nature of the sexual relationship between the cohabitants whose agreements they oversee. As clarified in the following text, provision of sex by the man to the woman is never suggested as the consideration for the provision of sex for the woman to the man. The implication is, therefore, that women are not benefited by, or do not enjoy, the sex—but provide it for ulterior motives such as economic support. For another example of judicial reliance on traditional assumptions, see the dissenting opinion of Justice Hill in *Rehak v. Mathis*, quoted *supra* note 475.

498. *See, e.g., Vallera v. Vallera*, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1948) (where woman denied maintenance and share of property acquired in man's name during relationship, “[e]quitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present”); *Roach v. Buttons*, 6 FAM. L. REP. (BNA) 2355 (Tenn. Ch. Ct. Feb. 29, 1980) (“[M]arriage is a legal state or legal relationship between two persons of the opposite sex and, as aforesaid, certain mutual benefits flow one to the other as a result of the marriage contract. . . . If plaintiff had married defendant, these rights and benefits would have been hers, but she entered into a relationship that is not sanctioned by Natural or Divine Law.”).

responsibility for them.⁴⁹⁹ Women therefore bear the burden of protecting themselves by declining the irregular relationship.⁵⁰⁰ At the same time, the institution of marriage as an expression of caring is portrayed as so fragile that only the most unwavering support by the state will guarantee its survival.⁵⁰¹ This could mean that other expressions of caring would entirely supplant marriage without vigilant enforcement of the socially endorsed forms of relationship, although that would be inconsistent with the portrayal of marriage as the only expression of commitment. Alternatively, it could mean that men and women would not choose to enter relationships of caring without pressure from the state.

These nightmarish images have much in common with what other disciplines tell us men think about women and relationship. The conception of women as either angels or whores is identified by Freud,⁵⁰² and supported by feminist accounts.⁵⁰³ The evil power of female sexuality is a recurrent subject of myth and history.⁵⁰⁴ The contrast of men fearing relationship as entrapping, and women fearing isolation, is the subject of Carol Gilligan's work in the psychology of moral development;⁵⁰⁵ others

499. See, e.g., *Baker v. Baker*, 222 Minn. 169, 171-72, 23 N.W.2d 582, 583-84 (1946) ("Where the arrangement under which the parties lived together was a meretricious one, the court will grant no relief, . . . [I]n such a situation, there is no implied obligation on the part of the man to compensate the woman for household services rendered by her.") (citations omitted); see also *supra* note 487 (discussing judicial analysis of contractual intention in cohabitation arrangements).

500. This suggestion arises out of the notion that the relationship is one equally chosen and therefore equally avoidable. The Illinois Supreme Court in *Hewitt v. Hewitt*, 77 Ill. 2d at 58, 394 N.E.2d at 1207, questions whether "legal rights closely resembling those arising from conventional marriages, can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as illicit or meretricious relationships" See also *Roach v. Buttons*, 6 FAM. L. REP. (BNA) at 2355 ("[S]he voluntarily and with her eyes open entered into an illicit relationship"); *Kinnison v. Kinnison*, 627 P.2d 594, 597 (Wyo. 1981) (Rooney, J., dissenting):

[T]he plain fact exists that both parties have assumed a relationship that is recognizable in law, morals and public policy *only* if the legal requirements for such relationship are met. For either of them to ask the courts to disregard this fact but sanction an aspect flowing from such relationship is impertinent.

501. For a court to enforce a cohabitation agreement would be "but another failure by the court to maintain the standards and principles upon which our society and nation were founded and which are essential to their successful continuance." *Kinnison v. Kinnison*, 627 P.2d at 597 (Rooney, J., dissenting). Justice Underwood, for the Supreme Court of Illinois in *Hewitt*, 77 Ill. 2d at 58, 394 N.E.2d at 1207-08, uses rhetorical questions to suggest a parade of horrors: "Will the fact [of enforcement] . . . encourage formation of such relationships and weaken marriage as the foundation of our family-based society? . . . And still more importantly: what of the children born of such relationships? . . . What of the sociological and psychological effects on them of that type of environment?"

502. XI S. FREUD, *A Special Type of Choice of Object Made by Men*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 165 (J. Strachey trans. & ed. 1957); XI S. FREUD, *On the Universal Tendency to Debasement in the Sphere of Love*, in *id.* at 179.

503. See, e.g., A. DWORKIN, *WOMAN HATING* (1974).

504. *Id.*, see especially 31-46, 118-50.

505. C. GILLIGAN, *supra* note 3, at 24-63 ("Images of Relationship").

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have explored the origins of that difference in the context of psychoanalytic theory.⁵⁰⁶ Raising these images to the level of consciousness and inquiry therefore seems to me an important aspect of understanding this particular set of cases. It is also a way of stepping beyond the confines of current doctrine and beginning to think about other ways of handling the reciprocal claims cohabitants may make of one another.⁵⁰⁷

EPILOGUE

The stories told by contract doctrine are human stories of power and knowledge. The telling of those stories—like the telling of any story—is, in one sense, an impoverishing exercise: The infinitely rich potential that we call reality is stripped of detail, of all but a few of its aspects. But it is only through this restriction of content that any story has a meaning. In uncovering the way doctrine orders, and thereby creates, represents, and misrepresents reality, I have suggested and criticized the particular meaning created by doctrinal stories, the particular limitations entailed in the telling of those stories.

My critique is in turn a story, which itself creates order and meaning. My story, too, is subject to the charge that it has reduced the richness of contract law and the multiplicity of its concerns to a few basic elements, that it misrepresents as much as it reveals. And, in fact, I do not believe that my story is the only one that can be told about contract doctrine. I insist only that it is *an* important story to tell.

My story reveals the world of contract doctrine to be one in which a comparatively few mediating devices are constantly deployed to displace and defer the otherwise inevitable revelation that public cannot be separated from private, or form from substance, or objective manifestation from subjective intent. The pain of that revelation, and its value, lies in its message that we can neither know nor control the boundary between self and other. Thus, although my story has reduced contract law to these few basic elements, they are elements that merit close scrutiny: They represent our most fundamental concerns. And the type of analysis I suggest can help us to understand and address those concerns.

By telling my story, I also hope to open the way for other stories—new accounts of how the problems of power and knowledge concretely hamper our ability to live with one another in society. My story both asks why

506. N. CHODOROW, *supra* note 22; D. DINNERSTEIN, *supra* note 22.

507. It may not be possible, ultimately, to “transcend” the kinds of categories our current ways of thinking and imagining condemn us to use in order to make sense of our experience. But being self-conscious about the particular *set* of categories inhering in particular doctrine may at least enable us to expand our repertoire, and enlarge the number of concrete alternatives available to us in this context, even while recognizing the limits of our culture.

those problems are not currently addressed by doctrine and traditional doctrinal analysis, and suggests how they might be. By presenting doctrine as a human effort at world-making, my story focuses fresh attention on those to whom we give the power to shape our world. My story requires that we develop new understandings of our world-makers as we create them, and are in turn created by them. This kind of inquiry, exemplified for me by feminist theory, can help us see that the world portrayed by traditional doctrinal analysis is already not the world we live in, and is certainly not the only possible world for us to live in. And in coming to that realization, we increase our chances of building our world anew.

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