A CONSENT THEORY OF CONTRACT

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INTRODUCTION

> The mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of non-performance. To be enforceable, the promise must be accompanied by some other factor. . . . The question now to be discussed is what is this other factor. What fact or facts must accompany a promise to make it enforceable at law?[1]

We look to legal theory to tell us when the use of legal force against an individual is morally[2] justified. We look to contract theory, in particular, to tell us which interpersonal commitments the law ought to enforce. Contract theory at present, however, does not provide a satisfactory answer to this question. The five best known theories or principles of contractual obligation—the will theory, the reliance theory, the fairness theory, the efficiency theory and the bargain theory—each have very basic shortcomings. A consent theory of contract avoids these difficulties while explaining coherent obligation in a plausible and coherent manner.

Theories are problem-solving devices. We assess the merits of a particular theory by its ability to solve the problems that gave rise to the need for a theory. We do not, however, assess a particular theory in a vacuum. No theory in any discipline, from physics to biology to philosophy, can be expected to solve every problem raised by the discipline.

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1. 1 A. Corbin, Corbin on Contracts § 110, at 490 (1963); see also Eisenberg, The Principles of Consideration, 67 Cornell L. Rev. 640, 640 (1982) ("A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced.").

2. The view that morality plays an important role in legal theory is discussed infra notes 109–11 and accompanying text.

Rather, we *compare* contending theories to see which theory handles problems the best.

Our criteria for comparing theories include at least three factors: (a) the number of known problems the theory handles as well or better than its rivals, (b) the centrality of the problems that the theory handles well, and (c) the promise that the theory offers for solving future problems. When we assess legal theories, the better a particular theory explains cases where we are confident of the right outcome, the more confident we will be with the answers it suggests for those cases at the margin where our intuitions are less secure.

In Part I of this Article, the five most popular theories of contractual obligation will be assessed. Each of these theories accurately captures some aspect of contractual obligation. However, the current lack of a consensus concerning the proper basis of contractual obligation suggests that each approach has fundamental weaknesses. The theories can be grouped into three distinct types: party-based, standards-based, and process-based theories. At least part of each theory's weakness stems from deficiencies that are inherent in its type. The purpose of this comparative analysis will be to demonstrate the need for a more overarching approach that can capture the truths of these theories while avoiding their errors.

In Part II, a consent theory of contract[3] will be described and applied to the problems identified in Part I. A consent theory posits that contractual obligation cannot be completely understood unless it is viewed as part of a broader system of legal entitlements. Such a system, based in morality,[4] specifies the substance of the rights individuals may acquire and transfer, and the means by which they may do so. Properly understood, contract law is that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent. Consent is the moral component that distinguishes valid from invalid transfers of alienable rights.

A consent theory of contract explains why we generally take an "objective" approach to contractual intent and why we deviate from this approach in some situations. In addition, a consent theory validates the enforcement of certain commitments where no bargained-for exchange exists—such as those supported by "nominal considera-

3. I first discussed the consent theory of contract in Barnett, Contract Scholarship and the Reemergence of Legal Philosophy (Book Review), 97 Harv. L. Rev. 1223 (1984), where I also attempted to place recent developments in legal philosophy in a historical context to explain the resurgence of normative legal philosophy in general and entitlement theories in particular.

4. The theory presented by this Article is based in, and required by, the normative requirements of morality. See infra notes 109–28 and accompanying text. Nonetheless, readers who favor a positivist perspective may wish to consider the requirement of consent solely as a means of understanding past and present judicial decisions, and of reconciling apparently conflicting doctrines.

tion"—and thereby rescues these useful legal arrangements from their present uncertain status in contract law. By providing a clear, common-sense test of enforceability that avoids the need for courts to distinguish "reasonable" from "unreasonable" reliance in determining whether a contract was formed, a consent theory enables parties to calculate better who bears the risk of reliance and, hence, facilitates reliance on interpersonal commitments. Finally, a consent theory's account of contractual obligation explains and justifies the historically recognized defenses to contractual obligation.

I. Assessing Current Theories of Contractual Obligation

Five theories—the will, reliance, efficiency, fairness, and bargain theories[5]—are most commonly offered to explain which commitments merit enforcement and which do not. These theories of contractual obligation actually exemplify three types of contract theories. Will and reliance theories are *party-based.* Efficiency and fairness theories are *standards-based.* The bargain theory is *process-based.* At least some of each theory's weaknesses are characteristics of its type. For this reason, each type of theory shall be separately considered here.

The criticisms presented in this section are neither comprehensive nor particularly novel. Rather, the discussion will identify the main problems that most theorists have acknowledged attach to each theory. The object here is not to refute any of these approaches. Instead, the aim will be to demonstrate that none provides a comprehensive theory of contractual obligation.

Will, reliance, efficiency, fairness, and bargain are best understood as core concerns of contract law. A theory of contractual obligation is needed to provide a framework that specifies when one of these concerns should give way to another.[6] Their proper relationship cannot be explained by a theory based solely on any one concern or on some unspecified combination. In Part II, I will explain how a consent theory of contract provides this necessary framework.

A. *Party-Based Theories*

Theories described here as party-based are those that focus on protecting one particular party to a transaction. A more accurate (though more awkward) label is "one-sided party-based." Will theories

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5. When an explanation of contractual obligation focuses exclusively on one of these factors, that factor may be identified as forming the basis of a distinct *theory*—as in "will theory." When two or more factors are combined, then they may more accurately be referred to as *principles*—as in "reliance principle"—or as *core concerns* of a more general theory of contractual obligation.

6. Cf. Eisenberg, supra note 1, at 642–43 (favoring an expansive conception of contractual obligation "that recognizes the enforceability of promises on the basis of various elements, and directs inquiry toward determining those elements while fashioning principles that reflect them in an appropriate way").

are primarily concerned with protecting the promisor. Reliance theories are primarily concerned with protecting the promisee. The undue emphasis that the will and reliance theories each place on one specific party creates insoluble problems for each approach.

1. *Will Theories.* — Will theories maintain that commitments are enforceable because the promisor has "willed" or chosen to be bound by his commitment. "According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect."[7] In this approach, the use of force against a reneging promisor is morally justified because the promisor herself has warranted the use of force by her prior exercise of will. A promisor cannot complain about force being used against her, since she intended that such force could be used when she made the commitment.[8]

Will theories depend for their moral force upon the notion that contractual duties are binding because they are freely assumed by those who are required to discharge them. Consequently, enforcement is not morally justified without a genuine commitment by the person who is to be subjected to a legal sanction. This position leads quite naturally to an inquiry as to the promisor's actual state of mind at the time of agreement—the so-called "subjective" viewpoint. After all, the theory can hardly be based on *will* if the obligation was *not* chosen by the individual but instead was imposed by law.

It has long been recognized that a system of contractual enforcement would be unworkable if it adhered to a will theory requiring a subjective inquiry into the putative promisor's intent.[9] Where we cannot discern the actual subjective intent or will of the parties, there is no practical problem, since we assume it corresponds to objectively manifested intentions. But where subjective intent can somehow be proved and is contrary to objectively manifested behavior, subjective intent should prevail if the moral integrity and logic of a will theory are to be preserved.

Of course, any legal preference for the promisor's subjective intent would disappoint a promisee who has acted in reliance on the appear-

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7. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 575 (1933).

8. See C. Fried, Contract as Promise 16 (1981) ("An individual is morally bound to keep his promises because he has *intentionally* invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.") (emphasis added); see also Burrows, Contract, Tort and Restitution—A Satisfactory Division or Not?, 99 Law Q. Rev. 217, 258 (1983) ("It is the acceptance of an obligation that is vital; it is not enough to have represented that facts are true or to have merely declared that one is intending to do something, for in such situations, the will has not committed itself to do anything."). Anthony T. Kronman also categorizes Professor Fried as a "will theorist." See Kronman, A New Champion for the Will Theory (Book Review), 91 Yale L.J. 404, 404 (1981). For a comparison of Professor Fried's will theory with a consent theory, see infra notes 146–47 and accompanying text.

9. See, e.g., Cohen, supra note 7, at 575–78; Burrows, supra note 8, at 258.

ance of legally binding intent.[10] Permitting a subjective inquiry into the promisor's intent could also enable a promisor to fraudulently undermine otherwise perfectly clear agreements by generating and preserving extrinsic evidence of ambiguous or conflicting intentions. Such a strategy might create a de facto option in the promisor. The promisor could insist on enforcement if the contract continued to be in her interest, but if it were no longer advantageous, she could avoid the contract, by producing evidence of a differing subjective intent.[11]

Because the subjective approach relies on evidence inaccessible to the promisee, much less to third parties, an inquiry into subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments.[12] Not surprisingly, and notwithstanding the logic of obligation based on "will," the objective approach has largely prevailed.[13] The subjectivist moral component, on which a will theory focuses to justify legal enforcement, conflicts unavoidably with the practical need for a system of rules based to a large extent on objectively manifested states of mind. While a person's objective manifestations generally reflect subjective intentions, a will theorist must explain the enforcement of the objective agreement where it can be shown that the subjective understanding of a party differs from her objectively manifested behavior.

Some will theorists uneasily resolve this conflict by acknowledging that other "interests"—for example, reliance—may take priority over

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10. See D. Hume, An Inquiry Concerning the Principles of Morals 30 n.5 (C. Hendel ed. 1957) (1st ed. 1751):

> If the secret direction of the intention, said every man of sense, could invalidate a contract, where is our security? And yet a metaphysical schoolman might think, that where an intention was supposed to be requisite, if that intention really had no place, no consequence ought to follow, and no obligation be imposed.

11. For an interesting example of a court suspecting a similar strategy by a party attempting to exploit the "mailbox rule," see Cohen v. Clayton Coal Co., 86 Colo. 270, 281 P. 111 (1929).

12. Note that neither the problem of reliance nor the problem of fraud would arise when a promisor, who manifested an intention to be bound, seeks to avoid liability by showing that the promisee did not actually or "subjectively" understand the promisor's actions to have this meaning. It provides few opportunities for fraud to permit the promisor to avoid liability by proving that the promisee understood the behavior as it was subjectively intended by the promisor and that consequently the promisee did not rely on the promisor's outward manifestation. Such a "subjective" inquiry, however rarely it might arise, is therefore quite properly permitted under a conventional objective approach. See, e.g., Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 385, 105 S.W. 777, 779 (1907). As will be discussed below, see infra notes 156–60 and accompanying text, this position is also in harmony with a consent theory of contract.

13. See, e.g., Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760–61 (2d Cir. 1946) (Frank, J., concurring); Restatement (Second) of Contracts § 2 comment b (1979); E. Farnsworth, Contracts § 3.6, at 114 (1982).

the will.[14] By permitting individuals to be bound by promises never intended by them to be enforceable, such a concession deprives a will theory of much of its force. Requiring the promisor's subjective will to yield always, or almost always, to the promisee's reliance on the promisor's objective manifestation of assent undermines the claim that contractual obligation is grounded in the individual's will[15] and bolsters the view that contractual obligations may be imposed rightfully on unwilling parties.[16] The inability of will theories to explain adequately the enforcement of objective manifestations of intention also accounts in part for the continued interest in reliance-based theories of contractual obligation.

2. *Reliance Theories.* — Theories that explain contractual obligation as an effort to protect a promisee's reliance on the promises of others have the apparent virtue of explaining why persons may be bound by the common meaning of their words regardless of their intentions. Thus, it has become increasingly fashionable to assert that contractual obligation is created by reliance on a promise.[17] A reliance theory is based upon the intuition that we ought to be liable in contract law for our assertive behavior when it creates "foreseeable" or "justifiable" reliance in others, in much the same way that we are held liable in tort law for harmful consequences of other acts.[18]

Reliance theories have nonetheless faced a seemingly insuperable

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14. See, e.g., C. Fried, supra note 8, at 58–63 (acknowledging that a failure to agree subjectively deprives a contract of its moral force on a will- or promise-based theory, but asserting that recovery may be available on other principles of "fairness," "encouragement of due care," or concerns of "administration").

15. See Burrows, supra note 8, at 258; see also D. Hume, supra note 10, at 30 n.5 ("The expression being once brought in as subservient to the will, soon becomes the principal part of the promise . . . .").

16. See P. Atiyah, The Rise and Fall of Freedom of Contract 6 (1979); see also Feinman, Critical Approaches to Contract Law, 30 UCLA L. Rev. 829, 834 (1983) ("[C]ontract law is like tort law and judicial action is like legislative action: all necessarily involve public policy judgments in imposing legal liability."). But see Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 785 n.121 (1982) (taking issue with Atiyah's analysis of reliance-based obligation).

17. While the literature is replete with suggestions about "the reliance principle," a comprehensive reliance theory of contract has never been systematically presented. Such an approach clearly underlies Gilmore's seminal work, *The Death of Contract*. See, e.g., G. Gilmore, The Death of Contract 71–72, 88 (1974). Atiyah appears to call for a reliance theory, although he also acknowledges that "the voluntary creation and extinction of rights and liabilities" should remain one of the "basic pillars of the law of obligations." P. Atiyah, supra note 16, at 779; see also Feinman, Promissory Estoppel and Judicial Method, 97 Harv. L. Rev. 678, 716–17 (1984) ("reliance principle" undermines "classical" contract law doctrines); Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L.J. 343, 344 (1969) (rules of promissory estoppel create a contract grounded on effects of reliance).

18. See G. Gilmore, supra note 17, at 88 ("We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.").

difficulty. As Morris Cohen wrote as early as 1933: "Clearly, not all cases of injury resulting from reliance on the word or act of another are actionable, and the theory before us offers no clue as to what distinguishes those which are."[19] This deficiency has led necessarily to the employment of such phrases as "justifiable" reliance or "reasonable" reliance.[20] These adjectives, however, depend on (usually vague) standards of evaluation that are unrelated to reliance itself, because, whether justified or unjustified, reasonable or unreasonable, reliance is present in any event.

Furthermore, whether a person has "reasonably" relied on a promise depends on what most people would (or ought to) do. We cannot make this assessment independently of the legal rule in effect in the relevant community, because what many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable. A reliance theory, therefore, ultimately does no more than pose the crucial question that it is supposed to answer: is this a promise that should be enforced?

The analysis is no different if we ask whether the promisor knew or had reason to know the promise would induce others to act in reliance,[21] even though this formulation lessens a reliance theory's preference for the promisee's interests. Unlike the subject of the prediction required by foreseeability analysis in tort law—the physical consequences that follow from physical actions—the subject of the prediction required by forseeability analysis in contract law is the actions of a self-conscious person. A prediction that a promise can reasonably be expected to induce reliance by a promisee or third party will unavoidably depend upon whether the promisee or third party believes that reliance will be legally protected. The legal rule itself cannot be formulated based on such a prediction, however, without introducing a practical circularity into the analysis.[22]

Furthermore, if a promise is defined, as in the Restatement (Sec-

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19. Cohen, supra note 7, at 579.

20. See, e.g., Eisenberg, supra note 1, at 656–59; Henderson, supra note 17, at 345.

21. See, e.g., Restatement (Second) of Contracts § 90(1) (1979). Section 90 qualifies reliance-based recoveries at the level of formation, by requiring both a "reasonable" expectation of reliance and the imposition of sanctions only if "injustice" cannot otherwise be avoided, and, at the level of remedies, by limiting the remedy "as justice requires." Id. Traditionally, however, the legal method employs doctrinal and theoretical analysis (that is consistent with underlying notions of justice) *to discover* where justice resides in a particular case. See Barnett, Why We Need Legal Philosophy, 8 Harv. J.L. & Pub. Pol. 6–10 (1985). Section 90 obviously begs this question. While it may have been the victim of overly cautious draftsmanship, no more precise formulations have been offered to take its place.

22. This appears to be an example of what George Fletcher has characterized as a "paradox of legal thought." See Fletcher, Paradoxes in Legal Thought, 85 Colum. L. Rev. 1263 (1985). If so, it will be resolved only by finding a basis independent of foreseeability on which to distinguish legally protected from legally unprotected reliance. See id. at 1269 ("When a paradox is uncovered, we can restore consistency in our legal

ond) of Contracts, 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,"[23] then it would seem that *every* promisor should reasonably expect to induce reliance. If so, "The real issue is not whether the promisor should have expected the promisee to rely, but whether the extent of the promisee's reliance was reasonable."[24] But this returns us once again to the difficulties of discerning "reasonable" reliance.

By providing an overly expansive criterion of contractual obligation, any theory that bases obligation on detrimental reliance begs the basic question to be resolved by contract theory: which *potentially* reliance-inducing actions entail legal consequences and which do not? A person's actions in reliance on a commitment are not justified—and therefore legally protected—simply *because* she has relied. Rather, reliance on the words of others is legally protected because of some as yet undefined circumstances.[25]

In short, a person, rather than being entitled to legal enforcement because reliance is justified, is justified in relying on those commitments that will be legally enforced. Reliance theories therefore must appeal to a criterion other than reliance to distinguish justified acts of reliance. Such a criterion has yet to be identified. It is suggested below[26] that a consent theory provides such a criterion.

3. *The Problem With Party-Based Theories.* — These difficulties reveal that reliance theories have much in common with will theories. Both sets of theories must resort to definitions of contractual enforcement that do not follow from either will or reliance, but are based on more fundamental principles that are left unarticulated. By failing to distinguish adequately between those commitments that are worthy of legal protection and those that are not, both the will and reliance theories have failed in their basic mission. Consequently, actual contract cases must be resolved ad hoc using vague concepts such as "reasonable-

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structures . . . by finding or constructing a distinction . . . that dissolves the paradox.").

23. Restatement (Second) of Contracts § 2 (1979). Note that the Restatement's definition of promise differs from the definition of "consent" offered below, infra notes 121, 143–44 and accompanying text, in that consent is limited to a particular kind of commitment—a commitment to be legally bound.

24. Eisenberg, supra note 1, at 659.

25. Notwithstanding these weaknesses, the increased recognition of reliance-based recovery exemplified by § 90 of the Restatement may have been, on balance, more helpful than harmful to the cause of freedom of contract. Recovery purportedly based on reliance provides a gap-filling safety valve for cases involving nonbargained-for reliance and thereby enables the market oriented bargain requirement to survive. See E. Farnsworth, supra note 13, § 2.19, at 89 ("The failure of the doctrine of consideration to provide a more satisfactory basis for enforcing such promises might have brought greater pressure to reform the doctrine had it not been for the increasing recognition of reliance as an alternative ground for recovery.").

26. See infra notes 192–97 and accompanying text.

ness" or "public policy," or by employing clearer but formalistic criteria such as "consideration."

Each theory primarily focuses on protecting one side of a contractual transaction: will theories focus on respecting the intentions of the promisor, while reliance theories focus on correcting the injury to the promisee. As a result, neither can properly assess the *interrelational* quality of the process of contracting. The law of contract exists to facilitate transactions between persons. In such an enterprise, there is no obvious reason why either party should be automatically preferred. While subjective intentions and reliance costs are important to a proper understanding of contractual obligation, something more basic is missing in theories of contractual obligation the primary focus of which is on only one of these core concerns.

Ironically, though both will and reliance theories assume a strongly moralistic stance—protecting "autonomy" or remedying "injuries"—neither provides an adequate moral framework to explain the legal enforcement of contracts. Both theories fail in this way because both attempt to explain contractual obligation in a theoretical vacuum. In liberal political and legal theory, the interrelational quality of social life is facilitated by identifying the entitlements or property rights of individuals in society. Theories that focus exclusively on the will of promisors or the reliance of promisees fail to utilize this conceptual framework. Not surprisingly, attempts to explain contractual obligations arising between persons go awry when those attempts ignore the foundations of interpersonal legal relationships.

B. *Standards-Based Theories*

Standards-based theories are those which evaluate *the substance* of a contractual transaction to see if it conforms to a standard of evaluation that the theory specifies as primary. Economic efficiency and substantive fairness are two such standards that have received wide attention.

1. *Efficiency Theories.* — One of the most familiar standards-based legal theories is the efficiency approach associated with the "law and economics" school.[27] Economic efficiency is viewed by some in this school as the maximization of some concept of social wealth or welfare: "the term *efficiency* will refer to the relationship between the aggregate benefits of a situation and the aggregate costs of the situation . . . . In other words, efficiency corresponds to 'the size of the pie.' "[28] According to this view, legal rules and practices are assessed to see whether

27. For a brief discussion of the role this school has played in provoking recent jurisprudential developments, see Barnett, supra note 3, at 1229–33.

28. A. Polinsky, An Introduction to Law and Economics 7 (1983); cf. Cooter & Eisenberg, Damages for Breach of Contract, 73 Calif. L. Rev. 1432, 1460 (1985) ("Economists say that a contract is efficient if its terms maximize the value that can be created by the contemplated exchange.").

they will expand or contract the size of this pie.[29]

In its least assertive variation, an economic assessment of law does not constitute a distinct theory of contractual obligation. Rather, economic analysis of legal rules is simply viewed as a "value-free" scientific inquiry that is confined to accounting for or explaining the consequences that result from particular legal rules or schemes.[30] So viewed, economic analysis is not a competing theory of contractual obligation, but only one of many yardsticks for assessing competing legal theories.

Economic analysis may also be viewed as a normative theory of law[31]—that is, economic efficiency is seen as providing the best or only yardstick of law.[32] However, because standard economic analysis begins by assuming that some agreements are enforceable,[33] normative efficiency theories fail to provide a distinction between enforceable and

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29. But cf. Coleman, Efficiency, Utility and Wealth Maximization, 8 Hofstra L. Rev. 509, 512 (1980) ("Economists as well as proponents of the economic analysis of law employ at least four efficiency-related notions, including: (1) Productive efficiency, (2) Pareto optimality, (3) Pareto superiority, and (4) Kaldor-Hicks efficiency.").

30. See id. at 548–49. One strain of this mode of economics—sometimes called "positive economics"—judges the efficacy of an economic explanation by its ability to generate hypotheses that can be verified by empirical research. For explanations of this methodology, see M. Friedman, The Methodology of Positive Economics, *in* Essays in Positive Economics 3 (1953); R. Posner, Economic Analysis of Law 12–13, 17–19 (2d ed. 1977). For applications of the methodology, see e.g., Posner & Landes, Legal Change, Judicial Behavior, and the Diversity Jurisdiction, 9 J. Legal Stud. 367 (1980); Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980). For criticisms of the methodology, see O'Driscoll, Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried, 9 J. Legal Stud. 355 (1980); Rizzo, Can There Be a Principle of Explanation in Common Law Decisions? A Comment on Priest, 9 J. Legal Stud. 423 (1980).

31. See Coleman, supra note 29, at 549; see also Posner, A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law, 9 Hofstra L. Rev. 775 (1981) ("The normative branch of the theory asserts that [promoting efficient resource allocation] . . . is what judges *should* try to do in deciding common law cases."). But cf. id. at 779 (Posner's denial that normative analysis is his "primary interest").

32. See, e.g., R. Posner, supra note 30; R. Posner, The Economics of Justice (1981). Some normative analysts straddle this distinction by asserting that other concerns—for example, distributive concerns—are normatively important as well. See, e.g., Calabresi, About Law and Economics: A Letter to Ronald Dworkin, 8 Hofstra L. Rev. 553 (1980); Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View From the Cathedral, 85 Harv. L. Rev. 1089 (1972). But see Dworkin, Why Efficiency? A Response to Professors Calabresi and Posner, 8 Hofstra L. Rev. 563 (1980) (disputing the coherence of "mixing" efficiency with distributive concerns in a normative analysis).

33. What these economists sometimes refer to as "market transactions," see, e.g., Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 15 (1960) ("The argument has proceeded up to this point on the assumption . . . that there were no costs involved *in carrying out market transactions*." (emphasis added)), are in fact contracts. See Cheung, Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements, 12 J.L. & Econ. 23 (1969) ("Every transaction involves a contract."); Furubotn & Pejovich, Property Rights and Economic Theory: A Survey of Recent Literature, 10 J. Econ. Literature 1137, 1141 (1972) ("[T]he standard competitive model envisions a special system where one particular set of private property rights governs the use of *all* resources, and where the exchange, policing and enforcement costs of contractual activities are *zero*.").

unenforceable commitments.[34] In a world of no transaction costs, it is asserted, individual economizing behavior would—by means of mutually advantageous exchanges of entitlements—ensure that legal entitlements are freely transferred to their highest value use.[35] Because such a hypothetical world presupposes enforceable exchanges of legal entitlements, it cannot (without much more) tell us why or when some promises are enforceable while others are not.

In a world of positive transaction costs,[36] economists who employ a model of "perfect competition" wish to assess the extent to which such costs block the movement of resources to their highest value use and the ways that legal rules and remedies—including those defining the background set of entitlements—can be altered to minimize such "inefficiency."[37] Such an analysis, based on detecting deviations from the background efficiency "norm" of initial entitlements and cost-free exchanges, must ultimately rest on no more than an assumption that such voluntary economizing exchanges are to some extent enforceable. Typically, then, efficiency analyses focus on the real world problems of forced exchanges (tort law) in an effort to make legal solutions to these nonmarket transactions approximate market solutions as closely as possible.[38] Efficiency analyses of voluntary exchanges (contract law) typically focus on issues other than the source of contractual obligation itself, such as appropriate remedies and other enforcement mecha-

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34. Of course, one could try to define "market transactions" so narrowly that the concept of contract would be excluded. Cf. A. Kronman & R. Posner, The Economics of Contract Law 3 (1979) ("One can talk about the principle or system of voluntary exchange for quite some time before it becomes necessary to consider the role of contracts and contract law in facilitating the process."). Such a restricted definition, however, is not warranted. In fact, it is not clear that the market mechanism will have its supposed efficiency-producing effect without taking enforceable commitments into account in a much broader view of "market exchanges." See, e.g., Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Stud. 411, 412 (1977) ("The approach taken here is that a gratuitous promise, to the extent it actually commits the promisor to the promised course of action . . . creates utility for the promisor over and above the utility to him of the promised performance."); see also infra notes 48–49 and accompanying text.

35. Cheung, The Structure of a Contract and the Theory of a Non-Exclusive Resource, 13 J.L. & Econ. 49, 50 (1970); see, e.g., Coase, supra note 33, at 15; cf. R. Posner, supra note 32, at 60 ("[T]he term 'value' in economics has generally referred to value in exchange . . . .").

36. See Coase, supra note 33, at 15:

> In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.

37. See, e.g., R. Posner, supra note 32, at 70; Calabresi & Melamed, supra note 32, at 1097.

38. See, e.g., R. Posner, supra note 30, at 11.

nisms,[39] and assume, rather than demonstrate, the enforceability of all voluntary commitments.[40] How we recognize voluntary commitments that ought to be enforced, as opposed to mere social promises that are not enforceable, is not generally discussed.

Moreover, some normative efficiency theories[41] generate additional problems. If we are to enforce only those real world agreements that increase the overall wealth of society,[42] then it must be either claimed or assumed that a neutral observer (for example, an economist-judge) has access to this information—that is, knows *which* agreements increase wealth and which do not.[43] Two problems arise from this assumption or claim. The first concerns its truth. Can observers ever have information about value-enhancing exchanges independent of the demonstrated preferences of the market participants? More importantly, can a legal system practically base its decisions on such information? It has been persuasively argued that such knowledge is simply not available independently of the production of information by real markets.[44] If it is not available, then it cannot provide workable criteria

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39. See Rea, Nonpecuniary Loss and Breach of Contract, 11 J. Legal Stud. 35, 36 (1982). But cf. Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 968 (1982):

> [T]he economic model provides no basis for an a priori conclusion about the efficiency of passage of ownership at any given stage of a transaction. Moreover, the passage of ownership, a legal entitlement, cannot be separated analytically (except for analyzing transaction costs and the kinds of issues raised by Calabresi and Melamed) from remedies for breach of contract.

40. See supra note 33 and accompanying text.

41. See, e.g., R. Posner, supra note 32, at 88–115 (discussing the "ethical and political basis of wealth maximization"). Other economists would use a more restrictive Pareto criterion of efficiency. See Coleman, Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law, 68 Calif. L. Rev. 221, 226–31 (1980).

42. Cf. Posner, supra note 34, at 415 ("The question whether it is economical for society to recognize a promise as legally enforceable thus requires a comparison of utility of the promise to the promisor with the social cost of enforcing the promise." (citation omitted)).

43. See, e.g., R. Posner, supra note 32, at 62 ("The purist would insist that the relevant values are unknowable since they have not been revealed in an actual market transaction, but I believe that in many cases a court can make a reasonably accurate guess as to the allocation of resources that would maximize wealth."); id. at 79 ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison. But the interpersonal comparison of values, in the economic sense, is feasible, although difficult, even when the values are not being compared in an explicit market.").

44. See, e.g., Demsetz, Some Aspects of Property Rights, 9 J.L. & Econ. 61, 67–68 (1966); Rizzo, The Mirage of Efficiency, 8 Hofstra L. Rev. 641, 648–51 (1980); Coleman, The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's *The Economics of Justice* (Book Review), 34 Stan. L. Rev. 1105, 1109 n.6 (1982). The seminal work in this area was done by Ludwig von Mises and F.A. Hayek. See, e.g., L. von Mises, Socialism 137–42 (rev. ed. 1951) (discussing why "artifical markets" are not possible); F. Hayek, The Use of Knowledge in Society, *in* Individualism and Economic Order 77, 77–78 (1948) ("The economic problem of society is thus not merely a problem of how to allocate 'given' resources . . . . It is rather a problem of how to secure the best use of

to distinguish enforceable from unenforceable promises.[45]

Assuming, however, that such knowledge is available, if we have direct access to information sufficient to know whether particular exchanges are value enhancing or not, why bother with contract law at all? Why not simply have a central authority use this knowledge to transfer entitlements independently of the parties' agreement, particularly given the fact that the need to reach agreements creates transaction costs? Or, why not let judges use this knowledge to ratify "efficient thefts"—that is, give thieves the option of obtaining title to property that they have taken from others without their consent, provided only that the thief pays court-assessed damages equal to the value to the victim of her property?[46] Normative economists are barred by their assumption about available information[47] from responding that we need the market to provide such information.

Observations provided by economic theory about the effects of certain contract rules or principles on the efficient allocation of resources may rightly influence our normative assessment of those rules

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resources known to any of the members of society, for ends whose relative importance only these individuals know."); see also J. Gray, Hayek on Liberty 40 (1984) (explaining Hayek's thesis that the "impossibility of socialism . . . derives from its neglect of the *epistemological functions* of market institutions and processes" (emphasis in original)); D. Lavoie, Rivalry and Central Planning 48–77 (1985) (describing Mises' contribution to the "socialist calculation debate" of the 1930s).

45. Of course, after a forced exchange—whether a tort or breach of contract—has occurred, a court may have no choice but to assess values as best it can. See, e.g., Muris, Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value, 12 J. Legal Stud. 379 (1983) (discussing compensation for subjectively measured damages that result from breaches of contracts); see also supra text accompanying note 38; infra note 130. At issue here, however, is not how best to rectify forced exchanges, but rather, why and which voluntary exchanges are legally enforceable. Therefore, it is appropriate to ask the normative-efficiency advocate whether a court system empowered to use an efficiency analysis can "outperform the market" in recognizing value-enhancing exchanges. There is no evidence that this is possible, and good reason to think that it is not. See supra note 44 and accompanying text.

46. Some economic analysts can be seen as coming perilously close to an "efficient theft" position when positing the legitimacy of "efficient breaches" of contract. For statements of the "efficient breach" position, see, e.g., A. Polinsky, supra note 28, at 29–32; R. Posner, supra note 30, at 88–93. But cf. Macneil, supra note 39 (criticizing an efficient breach analysis from an entitlements perspective).

47. See supra note 43 and accompanying text. An economist might argue that "marginal" value-enhancing adjustments can be made against a background of market institutions. See, e.g., R. Posner, supra note 32, at 111. This position has been criticized by Rizzo, supra note 44, at 651–54.

Normative theories can also be criticized as placing undue reliance on the "objective" as opposed to "subjective" concepts of cost. See, e.g., Rizzo, supra note 44, at 646 ("The difficulty in measuring what we have every reason to believe are relevant variables is not, however, an argument for disregarding them; rather, it demonstrates the essential limitations of the wealth-maximization criterion."). For an explanation of the difference between the two concepts of cost, see J. Buchanan, Cost and Choice 1–26 (1969); Thirlby, The Subjective Theory of Value and Accounting "Costs," *in* L.S.E. Essays on Cost 137 (J. Buchanan & G. Thirlby eds. 1981).

or principles, particularly when these effects are considered along with the effects such rules and principles would have on private autonomy, or "will," and on reliance. Most notably, the efficient allocation of resources may require a market composed of consensual exchanges that reveal and convey otherwise unobtainable information about personal preferences and economic opportunities.[48] Economic analysis may, therefore, suggest that demonstrated consent plays an important role in the law of contract, provided that efficient allocation of resources is a social activity that should be facilitated by a legal system.[49] From this perspective, the "transaction costs" created by a requirement of consent are no worse from an efficiency standpoint than any other cost of production. The costs of negotiating to obtain the consent of another may be resources well-spent because such negotiations serve to reveal valuable information.

Where the negotiating costs of obtaining consent become so high as to bar exchanges thought to be desirable by observers, at least three conclusions are possible. Each, however, argues against enforcing involuntary transfers. First, in the absence of a consensual demonstration of preferences, we do not really know if the exchange is worthwhile—value enhancing—or not.[50] Second, the inefficiency of government legal institutions that needlessly raise transaction costs may be principally responsible for making these consensual transactions prohibitively expensive. If so, then "government failure" and not "market failure" may be responsible for preventing the exchange and the appropriate response is to eliminate the true source of the ineffi-

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48. See supra note 44 and accompanying text; cf. S. Cheung, The Theory of Share Tenancy 64 (1969) ("[C]ompetition conglomerates knowledge from all potential owners—the knowledge of alternative contractual arrangements and uses of the resource; and transferability of property rights ensures that the most valuable knowledge will be utilized."); Demsetz, supra note 44, at 65 ("[I]nsisting on voluntary consent tends to produce information accuracy when many costs and benefits are known only by the individuals affected.").

49. The political theory embodied in normative economic analysis has been questioned by Ronald Dworkin. See Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191 (1980); Dworkin, supra note 32. Other critical analyses can be found in Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485 (1980); A Response to the Efficiency Symposium, 8 Hofstra L. Rev. 811 (1980).

50. This is true for two related reasons. The first is the epistemological problem presented by the absence of consent. See supra note 44 and accompanying text. The second—which follows from the first—is the effect that scarcity of goods has on an efficiency analysis. Transaction costs include negotiating agreements (exchange costs) and obtaining legal enforcement (police costs). Both can be viewed as necessary information-revealing and security-enhancing components of a given transaction. Such costs will be positive in a world of scarcity. Suppose that they exceed the potential gain from a contract and the contract is therefore not made. Is this situation any more "nonoptimal" than is the situation where the cost of any other scarce factor input—such as land or labor—prevents a transaction? Cf. Demsetz, Information and Efficiency: Another Viewpoint, 12 J.L. & Econ. 1, 4 (1969) ("To make [such an] assertion is to deny that scarcity is relevant to optimality, a strange position for an economist.").

ciency.[51] Finally, when negotiation costs make consensual agreements too expensive a means of obtaining the vital information about value, several alternative ways exist to generate this information without negotiation—for example, by forming a new company or "firm," by merging one company with another, or by combining products into a single package.[52]

In this analysis, demonstrated consent can be seen as playing an important role in any effort to achieve economic or allocative efficiency. Efficiency notions alone, however, cannot completely explain why certain commitments *should* be enforced unless it is further shown that economic efficiency is the exclusive goal of a legal order. The attempt to provide such a normative theory of wealth maximization, in the area of contract law at least, is fundamentally flawed.[53] In short, while the requirement of consent is in general supported by efficiency arguments, the normative justification for a consent theory of contract must be more broadly based.

2. *Substantive Fairness Theories.* — Another standards-based school of thought attempts to evaluate the substance of a transaction to see if it is "fair."[54] Substantive fairness theories have a long tradition dating back at least to the Christian "just price" theorists of the Middle Ages[55]

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51. Cf. Cheung, supra note 33, at 42 ("[T]ransaction costs also depend on alternative *legal* arrangements. For example, the varying effectiveness of law enforcement, or the varying corruptibility of courts, will affect the costs of transactions in the market place."); Coase, supra note 33, at 28 ("The kind of situation which economists are prone to consider as requiring corrective Government action is, in fact, often the result of Government action."); Demsetz, The Exchange and Enforcement of Property Rights, 7 J.L. & Econ. 11, 17 (1964) ("The value of what is being traded depends crucially on the rights of action over the physical commodity and on how economically these rights are enforced.").

52. See Coase, The Nature of the Firm, 4 Economica 386, 390–91 (1937); Demsetz, supra note 51, at 16.

53. For criticisms of normative economic analysis that extend beyond contract law, see Coleman, Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law, 94 Ethics 649 (1984); Coleman, supra note 44.

54. See, e.g., Eisenberg, supra note 16, at 754 ("[T]he new paradigm [unconscionability] creates a theoretical framework that explains most of the limits that have been or should be placed upon . . . [the bargain] principle, based on the quality of the bargain.").

This substantive fairness approach should be distinguished from approaches that focus on whether the contracting *process* is fair or unfair. See, e.g., Epstein, Unconscionability: A Critical Reappraisal, 18 J.L. & Econ. 293 (1975) (distinguishing procedural from substantive unconscionability); Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967) (same).

55. See R. Ely, Outlines of Economics 827 (5th ed. 1930). But medieval just price theory actually may have been more subjective and market oriented than most modern commentators assume. See Dempsey, Just Price in a Functional Economy, 25 Am. Econ. Rev. 471, 471, 474–76, 480–86 (1935) (more subjective); De Roover, The Concept of the Just Price: Theory and Economic Policy, 18 J. Econ. Hist. 418, 420, 421–34 (1958) (more market oriented).

and perhaps even to Aristotle.[56] Their modern incarnation in contract law can be found in nineteenth century discussions of the "adequacy of consideration"[57] and, more recently, in some treatments of "unconscionability."[58]

A substantive fairness theory assumes that a standard of value can be found by which the substance of any agreement can be objectively evaluated.[59] Such a criterion has yet to be articulated and defended.[60] Without such a criterion, substantive fairness theories fall back on one or both of two incomplete approaches. On the one hand, such theories tend to focus all their attention on a small fraction of commitments—those that are thought to be so "extreme" as to "shock the conscience" of the courts.[61] Most real world agreements are considered to be presumptively enforceable.[62] On the other hand, such theories tend to be-

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56. See, e.g., Aristotle, Nichomachean Ethics 125 (M. Ostwald trans. 1962):

> Thus, if (1) proportional equality is established between the goods, and (2) reciprocity effected, the fair exchange we spoke of will be realized. But if there is no proportionality, the exchange is not equal and fair, and (the association of the two will) not hold together.

The doubt expressed in the text as to whether this committed Aristotle to a "just price" position reflects the fact that he may only be attempting here to explain exchange transactions as a modern day economist would, rather than normatively assess the "justice" of the exchange. Of course, such a distinction is itself foreign to Aristotle's system.

57. See, e.g., Richardson v. Barrick, 16 Iowa 407, 412 (1864); T.P. Shepard & Co. v. Rhodes, 7 R.I. 470 (1863).

58. See, e.g., Restatement (Second) of Contracts § 208 comment c (1979) ("Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process . . . .").

59. Cohen noted this problem with what he called "the equivalent theory" of contract. See Cohen, supra note 7, at 581 (Due to problems of measurement, modern law "professes to abandon the effort of more primitive systems to enforce material fairness within the contract. The parties to the contract must themselves determine what is fair."). As a purely descriptive matter, the idea that exchange occurs because goods are of "equivalent" or equal value captivated economists for centuries, see supra notes 55–56 and accompanying text, until it was shown to be quite false. In fact, exchange occurs because both parties ex ante perceive the value of the goods to be exchanged as unequal. Each subjectively perceives the good or service offered by the other to be of greater value (to an unknowable extent) than what they are willing to trade for it. See C. Menger, Principles of Economics 180 (J. Dingwall & B. Hoselitz trans. 1981).

60. According to a thoroughly subjectivist theory of economic value, such a criterion is impossible to develop. See, e.g., L. von Mises, Human Action 94–98, 242, 354 (rev. ed. 1963) (discussing the impossibility of measuring exchange value because of the subjectivity of value); see also J. Buchanan, supra note 47, at 23–26 (briefly tracing the history of "the *subjectivist economics* of the latter-day Austrians, notably Mises and Hayek").

61. On the evolution of the "conscience" conception of equitable relief, see Johnson, Unconscionability and the Federal Chancellors: A Survey of U.C.C. Section 2-302 Interpretations in the Federal Circuits During the 1980's, 16 Lincoln L. Rev. 21, 56 nn.341–42 (1985).

62. See Eisenberg, supra note 16, at 754 ("This new paradigm does not replace the bargain principle, which is based on sound sense and continues to govern the normal case."); see also Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717, 1748 (1982) ("Surely all transactions made in organized markets at competi-

come process based—looking for either information asymmetries or what is called "unequal bargaining power."[63]

The first of these responses attempts to find extreme instances of violations of a standard that cannot be articulated—or at least cannot be articulated for most transactions,[64] while the latter represents a retreat from the substantive fairness position altogether. Therefore, at best a substantive fairness approach attempts to deal with a qualitative issue by making either a quantitative or a procedural assessment, but *what* is being measured—the nature of the unfairness—is not disclosed.[65]

Most importantly for this discussion, however, the substantive fairness approach fails to address squarely the most central and common problem of contract theory: which *conscionable* agreements should be enforced and which should not? This after all, is, or ought to be, the starting point of a useful theory of contractual obligation that purports to discern which commitments merit legal enforcement.[66] In sum, the substantive fairness approach provides neither meaningful standards nor predictable results. Both the extreme indeterminacy and the focus on aberrant cases inherent in a principle of substantive fairness prevent it from providing the overarching account of contractual obligation that contract theory requires.

3. *The Problem With Standards-Based Theories.* — All standards-based theories face two problems, one that is obvious and another that is more subtle. The obvious problem, which has already been discussed, is identifying and defending the appropriate standard by which enforceable commitments can be distinguished from those that should be unenforceable. The more subtle problem arises from the fact that stan-

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tive prices must go unquestioned, for to hold one of these exchanges suspect would be to strike down all identical transactions."). Even a severe critic of freedom of contract agrees that this is an aspect of current unconscionability doctrine. See Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 621 (1982).

63. See E. Farnsworth, supra note 13, § 4.28, at 314–16.

64. Professor Eisenberg, for example, confines his analysis to the identification of circumstances or "norms" that, if present, would call the fairness of the resulting agreement into question. He discusses exploitation of distress, transactional incapacity, susceptibility to unfair persuasion, and price-ignorance. See Eisenberg, supra note 16, at 754–85. Eisenberg's resort to suspect circumstances finesses the issue of discerning the quality of "unfairness" of the substantive bargain that he is seeking to police. In a consent theory, the circumstances he lists would be analyzed as (controversial) contenders for defenses that undermine the normal moral significance of consent. See infra notes 210–14 and accompanying text.

65. See Epstein, supra note 54, at 306 ("It is difficult to know what principles identify the 'just term,' and for the same reasons that make it so difficult to determine the 'just price.' "); see also L. von Mises, supra note 60, at 727–30 (discussing the nature and deficiencies of "just price" theories).

66. See supra note 1 and accompanying text.

dards-based contract theories are types of what Robert Nozick has called "patterned" principles of distributive justice:

> [A] principle of distribution [is] *patterned* if it specifies that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions . . . .
>
> Almost every suggested principle of distributive justice is patterned: to each according to his moral merit, or needs, or marginal product, or how hard he tries, or the weighted sum of the foregoing, and so on.[67]

The problem created by such patterned theories of justice—including theories based on some notion of efficiency—is that they require constant interferences with individual preferences. "Render possessions ever so equal, man's different degrees of art, care, and industry will immediately break that equality."[68] The maintenance of a pattern, therefore, requires either that persons be stopped from entering the contracts they desire, or that those in power "continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them."[69]

Such interferences are at least presumptively suspect. They may sometimes even be objectionable according to the particular standard that is being used to justify the intervention. For example, inefficiency might be shown to be the ultimate result of interventions to achieve "efficiency" that thwart individual preferences in this way.[70] And a system in which judges may—in the absence of fraud, duress, or some other demonstrable defect in the formation process—second-guess the wisdom of the parties may create more substantive unfairness than it cures.[71] More fundamentally, a theory of rights might support the conclusion that such interferences are unjust and wrong.[72]

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67. R. Nozick, Anarchy, State and Utopia 156–57 (1974).

68. D. Hume, supra note 10, at 25.

69. R. Nozick, supra note 67, at 163. See generally his discussion of "how liberty upsets patterns." Id. at 160–64.

70. See J. Gray, Indirect Utility and Fundamental Rights, Soc. Phil. & Pol'y, Spring 1984, at 73, 85 ("If direct utilitarian policy is counterproductive, we must accept practical constraints on it, and there is nothing to say that these will not include the distributive contraints imposed by principles conferring weighty moral rights on individuals."); see also Alexander, Pursuing the Good—Indirectly, 95 Ethics 315 (1985) (further elaborating this position).

71. Cf. Epstein, supra note 54, at 315 ("[W]hen the doctrine of unconscionability is used in its substantive dimension, . . . it serves only to undercut the private right of contract in a manner that is apt to do more social harm than good.").

72. See, e.g., R. Nozick, supra note 67, at 168 ("From the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of people's rights."); Mack, In Defense of Unbridled Freedom of Contract, 40 Am. J. Econ. & Soc. 1 (1981) (each person should have liberty to enter into and right to insist on fulfillment of any rights-respecting contract); see also infra notes 93–120 and accompanying text.

C. *Process-Based Theories*

Process-based theories shift the focus of the inquiry from the contract parties and from the substance of the parties' agreement to the manner in which the parties reached their agreement. Such theories posit appropriate procedures for establishing enforceable obligations and then assess any given transaction to see if these procedures were followed. The best known theory of this sort is the bargain theory of consideration.

1. *The Bargain Theory of Consideration.* — The origin of the modern doctrine of consideration can be traced to the rise of the action of assumpsit.[73] When the voluntary assumption of obligation came to be viewed as the basis of contractual enforcement, no one seriously suggested that *every* demonstrable agreement could or should be legally enforced. The number of agreements made every day are so numerous that for reasons of both practice and principle some distinction, apart from that made by purely evidentiary requirements,[74] must be made between enforceable and unenforceable agreements.

The doctrine of consideration was devised to provide this distinction.[75] Where consideration is present, an agreement ordinarily will be enforced. And, most significantly, where there is no consideration, even if the commitment is clear and unambiguous, enforcement is supposed to be unavailable. In the nineteenth century, the "bargain theory of consideration" was promoted by some—most notably Holmes and Langdell—as a way of answering the problem of which commitments merit legal protection. Today it is probably the predominant theory of consideration and is embodied in section 71 of the Restatement (Second) of Contracts:

> (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.[76]

This approach attempts to discern "mutuality" of inducement from the motives and acts of both parties to the transaction. It is not *what* is bargained for that is important; what solely matters is that each person's promise or performance is induced by the other's.

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73. See E. Farnsworth, supra note 13, § 1.6, at 19–20.

74. These are rules that enable courts and other strangers to the transaction to evaluate the legitimacy of contracting parties' often conflicting claims, for example, a statute of frauds or a rule regulating the use of parol evidence. See, e.g., U.C.C. §§ 2-201, 2-202 (1977).

75. See A. Simpson, A History of the Common Law of Contract 316 (1975); see also Eisenberg, supra note 1, at 640 (answer to the question of what kinds of promises should be enforced "traditionally has been subsumed under the heading 'consideration' ").

76. Restatement (Second) of Contracts § 71(1), (2) (1979).

The difficulties presented by the doctrine of consideration depend on which way the concept is viewed. If the doctrine is interpreted restrictively, then whole classes of "serious" agreements will be thought to be lacking consideration. In his recent discussion of consideration, Charles Fried lists four kinds of cases—promises to keep an offer open, to release a debt, to modify an obligation, and to pay for past favors—where promisees have traditionally had considerable difficulty obtaining legal relief for nonperformance because bargained-for consideration is lacking,[77] although it is generally conceded that the parties may have intended to be legally bound and that enforcement should therefore be available.[78] To these may be added unbargained-for promises to assume the obligations of another,[79] to convey land, to give to charities, and those made by bailees and within the family.[80]

In each of these types of cases, a promise is made and then broken. The promisee then seeks to base his cause of action on the promise. In many of these cases, the promise is a serious and unambiguous one. In each situation, however, there is no "bargain" and therefore no consideration for the promise.

Such cases as these invite attempts by judges and others to expand the concept of consideration beyond the bargain requirement.[81] Any such attempt to capture these and other types of cases will, however, run afoul of an opposing difficulty. If the web of consideration doctrine is woven too loosely, it will increasingly capture "social" agreements where legal enforcement is not contemplated—for example, promises of financial assistance between family members.[82] Thus, any expanded concept of consideration threatens to undermine the doctrine's tradi-

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77. See C. Fried, supra note 8, at 28.

78. That enforcement is deemed desirable in such cases is evidenced by statutes that have sometimes been enacted to provide a basis for liability. See id.; see, e.g., U.C.C. § 2-205 & comment 2 (1977) (Firm offer made binding in order "to give effect to the deliberate intention of a merchant . . . .").

79. See, e.g., U.C.C. § 3-408 & comment 2 (1977).

80. E. Farnsworth, supra note 13, § 2.19, at 90–91.

81. A well-known example of where the bargain requirement was stretched to the breaking point is, Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927) (holding that college's promise to set up a memorial fund was consideration for a promise to make a "gift" to the college). E. Farnsworth, supra note 13, § 2.19, at 91, characterizes the consideration analysis in this case as "tenuous." Because of the presence of formalities and the recital of "moral" consideration, a consent theory might have reached the same result. See infra notes 176–81 and accompanying text. Then again, certain terms of the pledge at issue may indicate an intent that it be revokable. See *Allegheny College*, 246 N.Y. at 372, 159 N.E. at 174 ("This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met."). Such difficulties of interpretation are to be expected in a legal regime that so uncertainly enforces unbargained-for, but formal, promises, since the parties cannot be sure of the form that will effectuate their purpose. See infra notes 166–81 and accompanying text.

82. See, e.g., Richards v. Richards, 46 Pa. 78, 82 (1863) (enforcing such assurances would be "exceedingly hurtful to the freedom of social intercourse").

tional function: distinguishing enforceable from unenforceable agreements in a predictable fashion to allow for private planning and to prevent the weight of legal coercion from falling upon those informal or "social" arrangements where the parties have not contemplated legal sanctions for breach.[83]

Each strategy to deal with the problems generated by a doctrine of consideration, therefore, wreaks havoc in its own way with a coherent theory of contractual obligation. With a restrictive definition like that of bargain, serious promises which merit enforcement are left unenforced. With an expansive formulation, informal promises that are thought to be properly outside the province of legal coercion will be made the subject of legal sanctions. The most recognized problem with the bargain theory is that it appears to have erred too far in the direction of under-enforcement.[84] However, the bargain theory suffers in a more fundamental way from its purely process-based character.

2. *The Problem With Process-Based Theories.* — The problem with process-based theories is not simply that they must strike a balance between over- and under-enforcement. Such trade-offs cannot be completely avoided in any system that bases decision-making on rules and principles of general application.[85] The real problem with process-based theories like the bargain theory of consideration is that they place insurmountable obstacles in the way of minimizing such difficulties of enforcement.

First, a process-based theory's *exclusive* focus on the process that justifies contractual enforcement conceals the substantive values that must support any choice of process. By obscuring these values, process-based theories come to treat their favored procedural devices as ends, rather than as means. Then, when the adopted procedures inevitably give rise to problems of fit between means and ends, a process-based theory that is divorced from ends cannot say why this has occurred or what is to be done about it. This inherent weakness of process-based theories has plagued the bargain theory of consideration.[86]

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83. See Cohen, supra note 7, at 573 ("Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience."); Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 813 (1941) ("There is a real need for a field of human intercourse freed from legal restraints, for a field where men may without liability withdraw assurances they have once given." (citation omitted)).

84. See Eisenberg, supra note 1, at 642.

85. See, e.g., Aristotle, supra note 56, at 141 ("[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms."); H.L.A. Hart, The Concept of Law 125 (1961) ("[U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact."). It is possible, however, that a presumptive approach to legal rulemaking minimizes this type of error. See infra notes 162–64 and accompanying text.

86. See Eisenberg, supra note 1, at 642 ("[S]uch an approach . . . tends to stifle judicial creativity and reconceptualization.").

The bargain theory, which was devised to limit the applicability of assumpsit,[87] fails to ensure the enforcement of certain reasonably well-defined categories of unbargained-for, but "serious" commitments.[88] Then, when courts are moved to enforce such commitments, the principal theory of consideration to which they adhere cannot account for these "exceptions" to the normal requirement of a bargain without appealing to concepts more fundamental than bargaining. Ironically, the rise of assumpsit—the source of the need for the consideration doctrine—was itself due to the inability of the then existing process-based writ system to accommodate enforcement of informal, but serious promises.[89]

Second, an exclusively process-based theory cannot itself explain why certain *kinds* of commitments are not and should not be enforceable. For example, it is widely recognized that agreements to perform illegal acts should not be enforceable. Similarly, slavery contracts are also thought to be unenforceable per se. If, however, agreements of these types were reached in conformity with all "rules of the game," a theory that looks only to the rules of the game to decide issues of enforceability cannot say why such an otherwise "proper" agreement should be unenforceable.

These two types of problems, however, are not confined to process-based theories. As was seen above,[90] party-based theories based on will and reliance are also plagued by an inability to account for and explain certain "exceptional" agreements that are enforceable without recourse to their animating principles. And theories based on principles of will, reliance, or efficiency have as hard a time as process-based theories explaining why certain agreements are unenforceable due to so-called "public policy" exceptions to their respective norms of contractual obligation.

Notwithstanding the weaknesses inherent in process-based theories, such theories offer significant advantages over both party-based and standards-based theories. By employing a neutral criterion for determining contractual enforcement, a process-based theory can better protect both the contractual intent and the reliance of both parties than one-sided party-based theories, provided it identifies features of the contractual process that normally correspond to the presence of contractual intent and substantial reliance. By identifying judicially workable criteria of enforcement, process-based theories can avoid the difficulties of extreme indeterminacy that were seen to plague standards-based theories.[91] They can, in short, better provide the tradi-

87. See supra note 73 and accompanying text.

88. See supra notes 77–80 and accompanying text.

89. See A. Simpson, supra note 75, at 136–96 (discussing difficulties in enforcing informal contracts prior to the development of assumpsit).

90. See supra notes 9–16, 19–25 and accompanying text.

91. See supra notes 31–45, 54–66 and accompanying text.

tionally acknowledged advantages of a system of generally applicable laws, such as facilitating private planning and helping to ensure equal treatment of similarly situated persons. Perhaps it is these advantages that have permitted a process-based theory like the bargain theory to survive its frequent detractors.

The significant administrative advantages of process-based theories suggest that the best approach to contractual obligation is one that preserves a procedural aspect of contract law, while recognizing that such procedures are *dependent* for their ultimate justification on more fundamental, substantive principles of right that occasionally affect procedural analysis in two ways. First, these principles might suggest specific improvements in procedures governing contract formation that are appropriate in the event that previously adopted procedures have created well-defined problems of under-enforcement. Second, these principles might serve to deprive certain procedurally immaculate agreements of their normal moral significance, thereby ameliorating identifiable problems of over-enforcement.[92] A consent theory of contract is such an approach.

II. A Consent Theory of Contract

A. *Entitlement Theory and Contract: The Central Importance of Consent*

1. *Entitlements as the Root of Contractual Obligation.* — The function of an entitlements theory based on individual rights is to define the boundaries within which individuals may live, act, and pursue happiness free of the forcible interference of others.[93] A theory of entitlements specifies the rights that individuals possess or may possess; it tells us what may be owned and who owns it; it circumscribes the individual boundaries of human freedom.[94] Any coherent theory of justice based on individual rights must therefore contain principles that describe how such rights are initially acquired, how they are transferred from person to person, what the substance and limits of properly obtained rights are, and how interferences with these entitlements are to

92. The relationship between procedural strictures and underlying principles is analogous to Ronald Dworkin's distinction between rules and principles, see R. Dworkin, Taking Rights Seriously 22–39 (1977), in that process rules of contract would be enforceable because of more fundamental principles and that such principles would also serve to define the outer limits of the rules.

93. The literature on entitlements or rights is vital and growing. I describe some of the factors that led to this growth in Barnett, supra note 3, at 1225–33. For a useful bibliography, see Nickel, Bibliographical Update/The Nature and Foundations of Rights, Crim. Just. Ethics, Summer/Fall 1982, at 64 (also citing other bibliographies). For a survey of the economic analysis of property rights, see Furubotn & Pejovich, supra note 33.

94. See Furubotn & Pejovich, supra note 33, at 1139 ("The prevailing system of property rights in the community can be described . . . as the set of economic and social relations defining the position of each individual with respect to the utilization of scarce resources." (citation omitted)).

be rectified.[95]

These constituent parts of an entitlements theory comport substantially with the traditional categories of private law. The issue of initial acquisition of entitlements in real and chattel resources is dealt with primarily in property law; tort law concerns the protection of and proper limits on resource use; and contract law deals with transfers of rights between rights holders.[96] Each category contains principles of rectification for the breach of legal obligations.[97]

Viewing contract law as part of a more general theory of individual entitlements that specifies how resources may be rightly acquired (property law), used (tort law), and transferred (contract law) is not new.[98] And, of course, the actual historical development of these legal categories has not perfectly conformed to the conceptual distinctions that an entitlements approach suggests. But this approach has long been neglected as a way of resolving some of the thorniest issues of contract theory and doctrine.

According to an entitlements approach, rights may be unconditionally granted to another (a gift), or their transfer may be conditioned upon some act or reciprocal transfer by the transferee (an exchange). Contract law concerns ways in which rights are transferred or alienated. Accordingly, the enforceability of all agreements is limited by what rights are capable of being transferred from one person to another. Whether a purported right is genuine or can be legitimately transferred is not an issue of contract theory only, but is one that may also require reference to the underlying theory of entitlements—that is, the area of legal theory that specifies what rights individuals have and the manner by which they come to have them. In this respect, the explanation of the binding nature of contractual commitments is derived from more fundamental notions of entitlements and how they are acquired and transferred.

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95. Cf. R. Nozick, supra note 67, at 150–53 (providing a tripartite definition of justice consisting of justice in acquisition, transfer, and rectification).

96. See Epstein, The Static Conception of the Common Law, 9 J. Legal Stud. 253, 255 (1980).

97. Another possible category is restitution, which specifies circumstances not covered by either contract or tort when compensation for nongratuitous transfers of resources might be available. See Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504 (1980).

98. Several commentators have recently referred to its historical antecedents. A. Simpson, supra note 75, provides the most rigorous examination of the history of this approach and its operation and demise. See also P. Atiyah, supra note 16, at 89 ("In Blackstone's *Commentaries*, . . . contract and succession are both dealt with as a means by which the title to property gets transferred."); M. Horwitz, The Transformation of American Law 1780–1860, at 162 (1977) ("As a result of the subordination of contract to property, eighteenth century jurists endorsed a title theory of contractual exchange according to which a contract functioned to transfer title to the specific thing contracted for.").

The subjects of most rights transfer agreements are entitlements that are indisputably alienable. In such cases the rules of contract law are entirely sufficient to explain and justify a judicial decision. However, in rare cases—such as agreements amounting to slavery arrangements or requiring the violation of another's rights—contract law's dependency on rights theory will be of crucial importance in identifying appropriate concerns about the substance of voluntary agreements. For example, agreements to transfer inalienable rights[99]—rights that for some reason cannot be transferred—or to transfer rights that for some reason cannot be obtained, would not, without more, be valid and enforceable contracts.[100]

Although existing theories of contractual obligation have failed to recognize this dependent relationship explicitly, such a notion may sometimes be implicit. For example, it is difficult to understand how any theory based on the "will" of the individual or the rectification of "harm" to an individual caused by reliance makes sense without assuming a background of more basic individual rights. One would not care at all about an individual's expressed "will" or any reliance injury she might have sustained unless that person has a pre-contractual right to "bind herself" or a right to be protected from certain kinds of harm. Efficiency-based theories also depend on a (usually assumed) set of entitlements that form the basis of subsequent "efficient" exchanges.[101] The many gaps in these articulated theories of contract are, in practice, most probably filled by our shared intuitions about fundamental individual rights. Making this conceptual relationship explicit helps to clarify what continues to be a hazy understanding of contractual obligation.

As Part I demonstrated, a proper understanding of contractual obligation and its limits requires an appeal to something more fundamental than the concepts of will, reliance, efficiency, fairness, or bargain. A

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99. Elaborating the important distinction between alienable and inalienable rights would require a more general discussion of rights theory than is possible here. See Barnett, Contract Remedies and Inalienable Rights, Soc. Phil. & Pol'y, Autumn 1986 (forthcoming); see also Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763 (1983) (discussing implications for contract theory of the distinction between alienable and inalienable rights). A number of recent treatments of the issue of inalienable rights reinforce its significance for legal and moral theory. See J. Feinberg, Rights, Justice, and the Bounds of Liberty 238–46 (1980); D. Meyer, Inalienable Rights: A Defense (1985); H. Veatch, Human Rights: Fact or Fancy? ch. 3 (1986); Epstein, Why Restrain Alienation?, 85 Colum. L. Rev. 970 (1985); Kuflik, The Inalienability of Autonomy, 13 Phil. & Pub. Affs. 271 (1984); McConnell, The Nature and Basis of Inalienable Rights, 3 Law & Phil. 25 (1984); Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985).

100. Other bases of obligation are possible besides contractual obligation, however, such as those recognized under the law of tort and restitution.

101. See Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347, 347 (1967) ("Economists usually take the bundle of property rights as a datum and ask for an explanation of the forces determining the price and the number of units of a good to which these rights attach.").

framework or theory is needed to order these fundamental concerns, to show where each "principle" stands in relation to others. Recognizing the necessity of such an inquiry places the contract theorist in the realm of entitlements or rights theory. The legitimacy of principles of contract that determine which transfers of rights are valid depends upon the nature of individual entitlements and the extent to which rights have been or will be acquired by the parties to a transfer. The process of contractual transfer cannot be completely comprehended, therefore, without considering more fundamental issues, namely the nature and sources of individual entitlements and the means by which they come to be acquired.

2. *The Allocative and Distributional Function of Individual Rights.* — Any concept of individual rights must assume a social context. If the world were inhabited by one person, it might make sense to speak of that person's actions as "good" or "bad." Such a moral judgment might, for example, look to whether or not that person had chosen to live what might be called the "good life."[102] It makes no sense, however, to speak about this person's rights. As one court noted: "Unless and until one is brought into relation with other men, or property, or rights, he has no obligation to act with reference to them; and this is true whether the obligation be called legal, moral, or reasonable."[103]

From the moment individuals live in close enough proximity to one another to compete for the use of scarce natural resources, some way of allocating those resources must be found. In short, some scheme of specifying how individuals may acquire, use, and transfer resources must be recognized. Certain facts of human existence make certain principles of allocation ineluctable. For example, it is a fundamental human requirement that individuals acquire and consume natural resources, even though such activity is often inconsistent with a similar use of the same resources by others.

"Property rights" is the term traditionally used to describe an individual's entitlements to use and consume resources—both the individual's person and her external possessions—free from the physical interference of others.[104] That possession and use of resources is by

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102. See, e.g., H. Veatch, For an Ontology of Morals (1971) (a critique of contemporary ethical theory from an Aristotelian perspective).

103. Garland v. Boston & M.R.R., 76 N.H. 556, 557, 86 A. 141, 142 (1913). As the court colorfully put the point in its discussion of duties of care: "The rule of reasonable care, under the circumstances, could not limit the conduct of Robinson Crusoe as he was at first situated; but as soon as he saw the tracks in the sand the rule began to have vitality." Id. at 563, 86 A. at 141; see also Demsetz, supra note 101, at 347 ("In the world of Robinson Crusoe property rights play no role.").

104. See, e.g., Furubotn & Pejovich, supra note 33, at 1139 ("[P]roperty rights do not refer to relations between men and things but, rather, *to the sanctioned behavioral relations among men that arise from the existence of things and pertain to their use.*" (emphasis in original)). Today, the term "property rights" tends to be limited only to rights to external resources. Traditionally, however, it was accorded the meaning employed in the

"right" suggests that any attempt at physical interference with possession and use may be resisted by force if necessary.[105] Additionally, if another interferes with a rightful distribution of resources, this violation may be rectified by *re*distributing resources.[106] Some rights to property can be exclusive and others less so. The exact contours of a proper theory of rights need not be specified here.[107] Only the recognition that *some* allocation of rights to resource possession and use is an unavoidable prerequisite of human survival and of human fulfillment is relevant to this discussion.

Although entitlements to resources can be acquired directly from nature by individual labor, in a complex society they will more likely be acquired from others.[108] Contract law, according to an entitlements approach, is thus a body of general principles and more specific rules the function of which is to identify the rights of individuals engaged in transferring entitlements, and thereby indicate when physical or legal force may legitimately be used to preserve those rights and to rectify any unjust interference with the transfer process.

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text—the moral and legal jurisdiction a person has both over her body *and* over external resources. See, e.g., J. Locke, An Essay Concerning the True Original Extent and End of Civil Government, *in* Two Treatises of Civil Government ch. V, § 27 (1690) ("every man has a 'property' in his own 'person' "). This conception of property was so well accepted that some radical abolitionists in the 19th century referred to slavery as the crime of "manstealing." See, e.g., S. Foster, The Brotherhood of Thieves, or a True Picture of the American Church and Clergy 10 (1843), quoted in The Antislavery Argument 138 (W. & J. Pease eds. 1965). This broader view of property rights also prevailed in the Middle Ages. See McGovern, Private Property and Individual Rights in the Commentaries of the Jurists, A.D. 1200–1550, *in* Essays in Memory of Schafer Williams (tentative title) (S. Bowman & B. Cody eds.) (forthcoming).

105. See, e.g., R. Nozick, Philosophical Explanations 499 (1981) ("[A] right is something for which one can demand or enforce compliance."); Furubotn & Pejovich, supra note 33, at 1139 ("Property rights assignments specify the norms of behavior with respect to things that each and every person must observe in his interactions with other persons, or bear the cost for nonobservance.").

106. See, e.g., Nickel, Justice in Compensation, 18 Wm. & Mary L. Rev. 379, 381–82 (1976) ("[C]ompensation protects just distributions, and the rights they involve, by undoing, insofar as possible, actions that disturb such distributions.").

107. I have more fully discussed this issue elsewhere. See Barnett, The Justice of Restitution, 25 Am. J. Juris. 117 (1980) (defending the justice of restitutive rectification); Barnett, Pursuing Justice in a Free Society: Part One—Power vs. Liberty, Crim. Just. Ethics, Summer/Fall, 1985, at 50 (discussing the sources and proper content of a property rights theory) [hereinafter cited as Pursuing Justice]; Barnett, Restitution: A New Paradigm of Criminal Justice, 87 Ethics 279 (1977) (discussing the merits of various approaches to rectification); Barnett, supra note 21, at 6–15 (discussing the classical liberal account of law and rights); Barnett, Public Decisions and Private Rights (Book Review), Crim. Just. Ethics, Summer/Fall, 1984, at 50 (discussing the methodology of a property rights approach).

108. Cf. Baird & Jackson, Information, Uncertainty, and the Transfer of Property, 13 J. Legal Stud. 299, 299 (1984) ("Few of us who own property actually have reduced it to private property from a state of nature (or ownership in common). No matter what theory justifies initial ownership rights, our enjoyment of most property rests on our ability to acquire it from someone else.").

3. *Consent as the Moral Component of a Contractual Transaction.* — The areas of moral obligations and legal obligations are not coextensive.[109] A moral obligation is something we ought to do or refrain from doing. A moral obligation that is not also a valid legal obligation can only be legitimately secured by voluntary means. That is, one may have a moral obligation to do something, but unless there is also a valid legal obligation, one cannot legitimately be forced by another to do it. A moral obligation is only a legal obligation if it can be enforced by the use or threat of legal force.[110] This added dimension of force requires moral justification. The principal task of legal theory, then, is to identify circumstances when legal enforcement is morally justified.[111]

Entitlements theories seek to perform this task by using moral analysis to derive individual legal rights, that is, claims that may be justifiably enforced.[112] A theory of contractual obligation is the part of an entitlements theory that focuses on liability arising from the wrongful interference with a valid rights transfer. Until such an interference is corrected—by force if necessary—the distribution of resources caused by the interference is unjust. Justice consists of correcting this situation to bring resource distribution into conformity with entitlements.[113]

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109. See L. Fuller, The Morality of Law 1–2 (rev. ed. 1969); R. Nozick, supra note 105, at 503 ("Political philosophy . . . is mainly the theory of what behavior legitimately may be enforced, and of the nature of the institutional structure that stays within and supports these enforceable rights . . . . In no way does political philosophy or the realm of the state exhaust the realm of the morally desireable or moral oughts.").

110. On the role that coercion ought to play in jurisprudential thought, see Nance, Legal Theory and the Pivotal Role of the Concept of Coercion, 57 U. Colo. L. Rev. 1 (1985).

111. One can distinguish between a *positive* legal obligation, which a particular legal system will enforce (whether or not it should), and a *valid* legal obligation, which is an obligation that it is morally appropriate to enforce. See, e.g., H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958). For an excellent discussion of this distinction, see J. Murphy & J. Coleman, The Philosophy of Law: An Introduction to Jurisprudence 7–68 (1984). In this section, the latter meaning is the one used.

112. See supra note 105 and accompanying text.

113. In certain rare circumstances, however, the protection of holdings might argue against such redistribution. The doctrine of adverse possession, for example, suggests that the justice of some present holdings of resources that did not originate by just means might nonetheless be considered rightful due to the passage of time. See Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 136 (1918). Similarly, once so much time has passed since the initial "taking" that both the original wrongdoer and the original owner (or her discernible heirs) are no longer alive to claim ownership, then an innocent person in possession might be acknowledged as holding good title. Cf. Sher, Ancient Wrongs and Modern Rights, 10 Phil. & Pub. Affs. 3 (1980) (discussing the problems of rectifying past injustices). In the absence of an identifiable victim, the innocent recipient of property that was originally wrongfully acquired would, as against the world, have the best claim to title—or so the argument goes. Falling as it would within the realm of property law and outside the boundaries of contract law, a critical analysis of such an argument is beyond the scope of this Article.

To identify the moral component that distinguishes valid from invalid rights transfers, it is first necessary to separate moral principles governing the rightful acquisition and use of resources from those governing their transfer. Rights are the means by which freedom of action and interaction are facilitated and regulated in society,[114] and thus the rights we have to acquire previously unowned resources and to use that which we acquire must not be subject to the expressed assent of others. Although societal acquiescence may be a practical necessity for rights to be legally respected, no individual or group need consent to our appropriation of previously unowned resources or their use for our rights to *morally* vest.[115]

Similarly, principles governing rights transfer should be distinguished from principles governing resource use. Tort law concerns obligations arising from interferences with others' rights. A tortfeasor who interferes with another's rights (rather than obtaining a valid transfer of those rights to herself) is liable because of that interference, not because she consented to be held liable for her actions that impair another's rights. A tortfeasor can be said to "forfeit" (as opposed to alienate or transfer) rights to resources in order to provide compensation to the victim of the tort.[116]

In contrast, contract law concerns enforceable obligations arising from the valid *transfer* of entitlements that are *already vested* in someone, and this difference is what makes consent a moral prerequisite to contractual obligation. The rules governing alienation of property rights by transfer perform the same function as rules governing their acquisition and those specifying their proper content: facilitating freedom of human action and interaction.[117] Freedom of action and interaction would be seriously impeded, and possibly destroyed, if legitimate rights holders who have not acted in a tortious manner could be deprived of

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114. See Barnett, Pursuing Justice, supra note 107, at 56–63.

115. The fact that society does not recognize a right cannot alone mean that morally such a right does not exist. Cf. R. Dworkin, supra note 92, at 184–85 (1977):

> In practice the Government will have the last word on what an individual's rights are, because its police will do what its officials and courts say. But that does not mean that the Government's view is necessarily the correct view; anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.

Requiring societal acquiescence for the moral vesting of initially acquired rights would amount to a "consent theory" of property acquisition. See Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 74 (1985) ("According to this theory, the original owner got title through the consent of the rest of humanity . . . .").

116. See J. Feinberg, supra note 99, at 239–40 (distinguishing between alienating and forfeiting rights); Kuflik, supra note 99, at 275 ("To say that autonomy cannot be alienated is not to imply that in special circumstances it cannot be forfeited. A person may lose through misconduct what it would be wrong for him to transfer or relinquish through consent or agreement.").

117. See Barnett, Pursuing Justice, supra note 107, at 56–63.

their rights by force of law without their consent.[118] Moreover, the moral requirement of consent mandates that others take the interests of the rights holder into account when seeking to obtain the rights she possesses.[119] Wallace Matson succinctly describes the view of justice that makes consent the moral component of contractual transfer:

> [Justice is] . . . rendering every man his due. A man's due is what he has acquired by his own efforts and not taken from some other man *without consent.* A community in which this conception is realized will be one in which the members agree not to interfere in the legitimate endeavors of each other to achieve their individual goals, and to help each other to the extent that the conditions for doing so are mutually satisfactory . . . . Such a community will be one giving the freest possible rein to all its members to develop their particular capacities and use them to carry out their plans for their own betterment . . . . [T]his activity is The Good for Man . . . .[120]

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118. See Baird & Jackson, supra note 108, at 299–300 ("Legal rules must confront the problems associated with the transfer of property from one individual to another. When we already *own* property, we want to ensure that we can control its disposition—that a new "owner" will not come into existence *without our consent.*" (emphasis added)).

119. Cf. Demsetz, supra note 44, at 64 ("A property right system which requires the *prior* agreement of these input owners before they can be put to a particular task insures that these costs will be taken into account [by others]."). Moreover, as Joel Feinberg has noted:

> To have a right typically is to have the discretion or "liberty" to exercise it or not as one chooses. This freedom is another feature of right-ownership that helps to explain why rights are so valuable. When a person has a discretionary right and fully understands the power that possession gives him, he can if he chooses make sacrifices for the sake of others, voluntarily give up what is rightfully his own, freely make gifts that he is in no way obligated to make, and forgive others for their wrongs to him by declining to demand the compensation or vengeance he may have coming or by warmly welcoming them back into his friendship or love. . . . Without the duties that others have toward one (correlated with one's rights against them) there could be no sense in the notion of one's superrogatory conduct towards other people, for to help others when one has the right to decline is precisely what conduct "above and beyond duty" amounts to.

J. Feinberg, supra note 99, at 156–57.

120. Matson, Justice: A Funeral Oration, Soc. Phil. & Pol'y, Autumn 1983, at 94, 111–12 (1983) (emphasis added). He then contrasts this "bottom up" conception of justice with another:

> The other conception holds justice to be the satisfaction of needs so as to bring everyone as far as possible onto the same plateau of pleasurable experience. The view of human life underlying it is that life consists of two separable phases, production and consumption; the consumption phase is where The Good lies; there is ultimately no reason why any individual should have any more or less of this Good than any other individual; and the problem of how to secure the requisite production is merely technical. Society based on this conception must be structured as a hierarchy of authority, in order to solve the problem of production and to administer justice, i.e. to adjust the satisfaction quanta. Thus I have called this justice from the top down . . . .

Consequently, the consent of the rights holder to be legally obligated[121] is the moral component that distinguishes valid from invalid transfers of alienable rights in a system of entitlements.[122] It is not altogether novel to suggest that consent is at the heart of contract law,[123] although the claim that contractual obligation arises from a consent to a transfer of entitlements and is thereby dependent on a theory of entitlements is not widely acknowledged.[124] Yet it is certainly a com-

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Id. at 112. For an example of the "top down" conception of justice applied to contract law, see Kronman, infra note 124.

121. Unlike "will" or "intent," the word "consent" can be used either subjectively to describe a state of mind or objectively to describe an interrelational act. Webster's New World Dictionary of the American language (1970) offers in part this definition:

> consent, *vi.*, . . . 1.*a*) to agree (*to* do something) *b*) give permission, approval, or assent (*to* something proposed or requested) 2. [Obs.] to agree in opinion—*n.* 1. permission, approval; or assent 2. agreement in opinion or sentiment [by common *consent*]

Id. at 302. Note that the first meaning for both the verb and the noun concerns an objective act, while the second meaning concerns a state of mind. The name "consent theory of contract" plays upon the objective-subjective ambiguity of "consent." While the focus of a consent theory may sometimes shift from objective to subjective consent, see infra notes 154–61 and accompanying text, the title is still apt, since even when operating at the objective level, the theory is concerned with the manifestation *of consent* and not a manifestation of some other intention. For clarity, "assent" will be used here to mean a subjective intent to be legally bound, and "consent" will generally be used to mean an objectively manifested intent to be legally bound, see infra notes 133–53 and accompanying text.

122. See Demsetz, supra note 44, at 62 ("A private property right system requires the prior consent of 'owners' before their property can be affected by others.").

123. See P. Atiyah, Promises, Morals, and Law 177 (1981) ("[P]romising may be reducible to a species of consent, for consent is a broader and perhaps more basic source of obligation."); Green, Is an Offer Always a Promise?, 23 Ill. L. Rev. 95, 95 (1928) ("[W]hen we are sophisticated enough to have ideas of ownership, societal or legal, ideas of right, as distinguished from ideas about situations of fact, an offer to sell may simply be an expression of consent or volition that ownership shall pass if and when the offer is accepted . . . .").

If promising is but a special instance of consent, it may well be that the traditional conception of contracts as *exclusively* concerning the matter of enforceable promises is what has blinded the profession to the more fundamental theoretical role of consent. For an example of the typical modern insistence on the promisory nature of contracts, see E. Farnsworth, supra note 13:

> The second limitation suggested by this definition is that the law of contracts is confined to *promises*. It is therefore concerned with exchanges that relate to the *future* because a "promise" is a commitment by a person as to his future behavior. Examples of exchanges that do not include such a commitment (and so do not involve a contract in this sense) are the transaction of barter . . . and the present (or "cash") sale . . . . Because no promise is given in either of these exchanges, there is no contract.

Id. § 1.1, at 4 (emphasis in original) (citations omitted). Because a consent theory embraces more than the enforcement of promises, the most appropriate terms to describe contracting parties might be "transferor" and "transferee." For convenience, however, the more conventional terms promisor and promisee will still occasionally be used here.

124. But see Cheung, supra note 33, at 23 ("The transactions conducted in the market place entail outright or partial transfers of property rights among individual con-

monly held and plausible conception of ownership that owning resources gives one the right to possess, use, and dispose of them free from the use or threat of force by others.[125]

In a modern society the chain between initial acquisition of resources and their ultimate consumption can be quite long and complicated. While controversies may exist, even among those who acknowledge the legitimacy of property rights in principle, about the proper mode of resource acquisition[126] and the proper manner of resource use,[127] a valid transfer of rights must be conditioned on some act of the rights holder. The allocative function that an entitlements theory is devised, in part, to fulfill suggests that the way rights are transferred is by consent.[128]

In sum, legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights. Within an entitlements approach, contractual obligation, as distinct from other types of legal obligation, is based on that consent.

B. *Defining Consent*

1. *Consent and the Objective Theory of Contract.* — At first blush, a consent theory of contract may appear to some to be a version of a will theory. Understanding the fundamental differences between the two approaches, therefore, will assist an appreciation of the comparative virtues of the consent theory.

A will theory bases contractual obligation on the fact that an obligation was freely assumed. As was shown in Part I, a theory that bases

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tracting parties."); Evers, Toward a Reformulation of the Law of Contracts, 1 J. Libertarian Stud. 3 (1977) (describing a "title-transfer theory" of contract based on property rights); Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472, 472 (1980) (Contracts "provide for the exchange of property."); Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 523 ("[E]xchange relations . . . presuppose some idea of property . . . ."). For a recent attempt to employ the concept of property to explain the law of restitution and some issues of contract damages, see Friedmann, supra note 97.

125. See, e.g., Kronman, supra note 124, at 472. This idea is not a new one. See T. Aquinas, Summa Theologica, reprinted in 20 Great Books of the Western World 311 (1952) ("[T]he power of private persons is exercised over the things they possess, and consequently their dealings with one another as regards such things depend on their own will, for instance in buying, selling, giving and so forth.").

126. See, e.g., L. Becker, Property Rights: Philosophic Foundations 32–56 (1977) (critically assessing the labor theory of property acquisition); Epstein, Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979) (defending "first possession" as the means of acquiring property); Rose, supra note 115 (distinguishing the labor, consent, and first possession theories of property acquisition and discussing their respective merits).

127. See generally Coleman, Moral Theories of Torts: Their Scope and Limits. Part I, 1 Law & Phil. 371 (1982) (assessing competing moral theories of torts); Coleman, Moral Theories of Torts: Their Scope and Limits. Part II, 2 Law & Phil. 5 (1983) (same).

128. But see supra note 113.

contractual obligation on the existence of a "will to be bound" is hard pressed to justify contractual obligation in the absence of an actual exercise of the will. It is difficult to see why one is legally or morally committed to perform an agreement that one did not actually intend to commit oneself to and still hew to a theory that based the commitment on its willful quality. This subjective component creates a tension between a will theory and the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individual's behavior that apparently manifests their assent[129] to a transfer of entitlements.

In contrast to a will theory, a consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal objective-subjective relationship in contract law. The concept of rights or entitlements is a social one whose principal function is to specify boundaries within which individuals may operate freely to pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity. Lawyers tend to concentrate on the function entitlements notions play in specifying the proper remedies for wrongful conduct, but given the uncertain justice of *any* legal remedy,[130] a vital function of a system of well-defined entitlements is the avoidance of disputes. And, while it is not unusual to discuss avoiding disputes by raising the cost of misconduct and thereby deterring "bad" persons,[131] it is frequently overlooked that an entitlements view must take a "good man" view of law at least as seriously as it does a "bad man" view.[132]

The boundaries of individual discretion that are defined by a sys-

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129. See supra note 121.

130. Cf. Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice, 32 Emory L.J. 937, 979 (1983) ("One of the tragedies of justice is the necessity of objectifying the worth of subjectively valued rights, when rights are expropriated and not bargained for.").

131. The "bad man" view of law was made famous by Justice Holmes:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897). For commentators who employ a "bad man" view, see R. Posner, supra note 30, at 164–72; Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

132. By focusing exclusively on the sanctions imposed for illegal conduct, a "bad man" view underestimates the epistemological function of general principles and rules of law. Properly crafted rules and principles supply vital information to "good" persons (and their legal counsel) who seek to avoid violating the rights of others without regard to the severity of the penalties that may attach to such conduct. See H.L.A. Hart, supra note 85, at 86–88 (distinguishing the "internal" from the "external" aspect of obligatory rules); F. Hayek, 1 Law, Legislation and Liberty 35–123 (1973) (describing the role of rules in creating and preserving a "spontaneous order" of human interaction); Hegland, Goodbye to Deconstruction, 58 S. Cal. L. Rev. 1203 (1985) (defending use of rules and principles against recent deconstructionist criticisms).

tem of clear entitlements serve to allocate decision-making authority among individuals. Vital information is thereby conveyed to all those who might wish to avoid disputes and respect the rights of others, provided they know what those rights are.[133] Potential conflicts between persons who might otherwise vie for control of a given resource are thus avoided. Therefore, an entitlements theory demands that the boundaries of protected domains be ascertainable, not only by judges who must resolve disputes that have arisen, but, perhaps more importantly, by the affected persons themselves before any dispute occurs.

In contract law, this informational or "boundary defining" requirement means that an assent to alienate rights must be *manifested* in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of assent that is accessible to all affected parties, that aspect of a system of entitlements that governs transfers of rights will fail to achieve its main function. At the time of the transaction, it will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected. Without such communication, parties to a transaction (and third parties) cannot accurately ascertain what constitutes rightful conduct and what constitutes a commitment on which they can rely. Disputes that might otherwise have been avoided will occur, and the attendant uncertainties of the transfer process will discourage reliance.

While this imperative of a system of entitlements may initially strike some as ad hoc, we react this way only because we are not used to thinking of contractual obligation as arising from the transfer of rights. The relationship between legal rules and entitlements theory is better understood in the realm of property law, where the boundary defining function of rights also necessitates an objective approach. No serious theory would suggest that persons initially acquire rights to (unowned) resources simply because they subjectively believe they have done so. Rather, rights to unowned objects are acquired by performing some demonstrable and meaningful act with respect to those objects. Depending on the theory of acquisition that is held and the conventions that are adopted, the act required might be possessing or staking out the resource, transforming it, or filing a claim to it with a claims office.[134] Each of these conventions objectively manifests ownership over a previously unowned or abandoned resource by conveying to others an unmistakeable claim to possess, control, and utilize the resource.[135]

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133. See, e.g., Rose, supra note 115, at 78–79 ("Possession now begins to look even more like something that requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question.").

134. See, e.g., Baird & Jackson, supra note 108, at 301–11 (discussing the advantages and disadvantages of various conventions used to record and transfer interests in real and personal property).

135. See Rose, supra note 115, at 77 ("The clear-act principle suggests that the common law defines acts of possession as some kind of *statement*. As Blackstone said, the

The analysis for contract law is similar. Requiring the consent of the rights holder as a condition of a valid transfer of rights is absolutely vital to a regime of entitlements for the reasons discussed above.[136] But, whether one has consented to a transfer of rights under such a regime generally depends not on one's subjective opinion about the meaning of one's freely chosen words or conduct, but on the ordinary meaning that is attached to them. Language itself—the way that assent to a transfer is manifested—is as much a convention as those conventions governing rights acquisitions. If the word "yes" ordinarily means *yes*, then a subjective and unrevealed belief that "yes" means *no* is generally immaterial to a regime of entitlements allocation. Only a general reliance on objectively ascertainable assertive conduct will enable a system of entitlements to perform its allotted boundary-defining function.

Further, a legal theory that attempted to rest the rightful acquisition, use, or transfer of resources solely on subjective intentions could not provide a coherent set of rights or entitlements. There is nothing to prevent subjective intentions from conflicting with one another. Therefore, to the extent a theory attempts to derive rights from such intentions, it would produce "rights" that were necessarily in irreconcilable conflict with each other. Such a theory would then need to appeal to still other principles to resolve these conflicting claims of "rights," but any such appeal would mean that this type of legal theory was not a theory of rights at all.[137]

The function of a rights theory is to define the boundaries of permitted human action[138] and resolve competing claims.[139] A coherent rights theory will, therefore, allocate rights largely on the basis of fac-

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acts must be a *declaration* of one's intent to appropriate." (citation omitted)). But cf. Helmholz, Adverse Possession and Subjective Intent, 61 Wash. U.L.Q. 331, 357 (1983) (Courts "regularly award title to the good faith trespasser, where they will not award it to the trespasser who knows what he is doing at the time he enters the land in dispute."). The tendency in the doctrine of adverse possession discussed by Helmholz may be analogous to those circumstances in a consent theory of contract, discussed infra notes 154–60 and accompanying text, where the presumptive significance of objective assent may be overcome by proof of the subjective understanding of the promisee.

136. See supra notes 109–28 and accompanying text.

137. That under a rights theory rights must be reconcilable is mentioned by R. Nozick, supra note 67, at 166 ("Individual rights are co-possible; each person may exercise his rights as he chooses."), and elaborated in Steiner, The Structure of a Set of Compossible Rights, 74 J. Phil. 767 (1977) (describing the logical requirement that a system of rights entails the compatible exercise—or "compossibility"—of designated rights). On the role that this formal requirement plays in the formulation of substantive rights, see Barnett, Pursuing Justice, supra note 107, at 58, 60.

138. See supra notes 93–94 and accompanying text.

139. Cf. J. Feinberg, supra note 99, at 152 ("[N]ot all claims put forward as valid really are valid; and only the valid ones can be acknowledged as rights."); id. at 155 ("To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles."); Steiner, supra note 137, at 768 ("Someone called upon to adjudicate between two persons whose actions are mutually obstructive and each of whom is able to show that his own action falls within the range

tors that minimize the likelihood of generating conflicting claims. In this regard, objectively manifested conduct, which usually reflects subjective intent, provides a far sounder basis for contractual obligation than do subjectively held intentions. Evidence of subjective intent that is extrinsic to the transaction and was unavailable to the other party is relevant, if at all, only insofar as it helps a court to ascertain the "objective" meaning of certain terms.[140]

What exact meaning must a court conclude was conveyed by a promisor to a promisee to find that a contractual commitment was incurred? If consent is properly thought of as "objective" or "manifested" assent, what is it that must be assented to for a contractual obligation to arise? It is not enough that one manifests a commitment or promises to perform or refrain from doing some act. Such a manifestation would be nothing more than a promise.[141] Contract theory searches for the "extra" factor that, if present, justifies the legal enforcement of a commitment or promise.

An entitlements theory specifies that consent to a transfer of rights is this factor.[142] The consent that is required is a *manifestation of an intention to alienate rights*.[143] In a system of entitlements where manifested rights transfers are what justify the legal enforcement of agreements, any such manifestation necessarily implies that one intends to be "legally bound," to adhere to one's commitment. Therefore, the phrase "a manifestation of an intention to be legally bound"[144] neatly captures what a court should seek to find before holding that a contractual obligation has been created.[145]

Charles Fried maintains that a promisor incurs a moral obligation

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denoted by a claimed right, will . . . conclude that at least one of these two claimed rights is invalid.").

140. See, e.g., Kabil Dev. Corp. v. Mignot, 279 Or. 151, 157–58, 566 P.2d 505, 508–09 (1977) (discussed in Eisenberg, The Responsive Model of Contract Law, 36 Stan. L. Rev. 1107, 1119 n.36 (1984)).

141. See, e.g., Restatement (Second) of Contracts § 2 (1979) ("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.").

142. See supra notes 117–128 and accompanying text.

143. Such a manifestation of intention to alienate rights can be direct or indirect. The object of a direct rights transfer contract is to transfer alienable rights—for example, rights to external possessions. The object of an indirect rights transfer contract is to assure that someone else will exercise her inalienable rights—for example, the right to one's labor—in a particular way by requiring a transfer of alienable rights (for example, money damages) if there is no performance. See supra note 99; infra note 218; cf. Green, supra note 123, at 95 (distinguishing between a "self-executing offer" and "an offer to do or refrain from doing something").

144. Cf. Green, Is an Offer Always a Promise?, 23 Ill. L. Rev. 301, 302 (1928) (using the phrase, "an expression of will or consent to be answerable"); Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale L.J. 621, 646 (1919) ("Agreements which are physically possible and legally permissible should, on principle, be enforceable . . . if it was the intention of the parties to assume *legal* relations.").

145. Of course, a further requirement of contractual obligation in a system of enti-

because she intentionally invokes a social convention whose purpose is to cause others to expect the promised performance.[146] By contrast, a consent theory specifies that a promisor incurs a contractual obligation the legal enforcement of which is morally justifiable by manifesting assent to legal enforcement and thereby invoking the institution of contract. In the circumstances described by Fried, a promisor may have a moral obligation to do what she promised. Without more she would not have a legal obligation and a promisee would not have a legal right to performance.[147] She incurs a contractual obligation to perform only when she manifests to a promisee her intention to be legally bound. The basis of contractual obligation is not promising per se. The basis of contract is consent.

It is not paradoxical to adhere to an "objective" notion of consent that is based on just those ordinary words and deeds of persons that are commonly understood to reflect their subjective assent to be legally bound, notwithstanding that they may not have in fact meant to convey the commonly understood meaning.[148] A consent analysis is genuinely interested in the actual intentions of the parties, but we never have direct access to another individual's subjective mental state. We thus must always learn the meaning of terms by comparing (1) the conduct of persons with their words, or (2) their conduct and words in one context with those in another, or (3) one person's conduct and words with another person's conduct and words.[149] Even in a subjective theory, evidence of subjective assent must be manifested at some point—if only from the witness stand or in self-serving documents.

Therefore, the only difference in the treatment of evidence of subjective intent between subjective and objective approaches to contract concerns evidence of subjective intent that is *extrinsic* to the transaction. At the time of formation, such extrinsic evidence is unavailable to the other party who witnesses what did or did not appear to be an assent to a transfer of rights. Since, by definition, this information is unavailable to the other party at the time assent is manifested, its later use by a court (following a subjective approach) defeats the function that consent performs in clearly defining and communicating the boundaries of rightful conduct *at the time of the transaction*.[150] A truly subjective ap-

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tlements is that the rights transferred be valid and alienable. See supra notes 99–100 and accompanying text.

146. See C. Fried, supra note 8, at 16.

147. Cf. 1 A. Corbin, supra note 1, § 110, at 490 ("To be enforceable, the promise must be accompanied by some other factor.").

148. Similarly, it is not considered paradoxical that the criminal legal system generally refuses to allow jury verdicts to be impeached by evidence of innocence not presented at trial.

149. This list may not be exhaustive.

150. Although a promisee may rightfully rely on the objective manifestation, if she does not in fact rely on this manifestation it would not serve the boundary defining purpose to enforce it. See infra notes 156–60 and accompanying text.

proach to contractual intent would admit this evidence and an objective one would exclude it.

The fact that objective consent generally takes precedence over subjective assent does not jeopardize the liberty interest that rights have been formulated to protect. No one suggests that an objective approach to either rights acquisition or resource use is inconsistent with the liberty interest that the scheme of private rights was intended to serve. Rather, these approaches to rights acquisition and resource use are favored precisely because they respect and protect the rights and liberty interests *of others*, whose plans and expectations would be severely limited if they were not entitled to rely on things as they appear to be and to take the assertive conduct of others at face value.[151]

The same is true in contract law. Volitional acts—words or deeds—that manifest assent to transfer entitlements presumptively bind the actor regardless of subjective intent. This "strict liability" theory of contract is appealing precisely because it too recognizes the legitimate rights and liberty interests in others.[152] Lon Fuller noted over forty years ago that a law of contract which seeks to secure a realm of private autonomy has a "bipartisan" quality and that this quality gives rise to an objective theory of contract.[153]

In a consent theory, then, contracts are interpreted with an eye

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151. A correlative notion is the concept of legal as opposed to actual notice. Cf. 3 J. Pomeroy, Equity Jurisprudence § 842, at 292 (5th ed. Symons 1941) ("If ignorance of the law were generally allowed to be pleaded, there could be no security in legal rights, no certainty in judicial investigations, no finality in litigations." (footnote omitted)).

152. Cf. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151, 168–69 (1973):

> The doctrine of strict liability holds that proof that the defendant caused harm creates [a] . . . presumption [in favor of the plaintiff] because [under the doctrine of strict liability] proof of the nonreciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose. There is no room to consider, as part of the prima facie case, allegations that the defendant intended to harm the plaintiff, or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant . . . .

153. In distinguishing his concept of "private autonomy" from a will theory, Fuller observed that:

> The principle of private autonomy, properly understood, is in no way inconsistent with an 'objective' interpretation of contracts. Indeed, we may go farther and say that the so-called objective theory of interpretation in its more extreme applications becomes understandable only in terms of the principle of private autonomy. . . . [This theory] rests upon the need for promoting the security of transactions. Yet security of transactions presupposes "transactions," in other words, acts of private parties which have a law-making and right-altering function.

Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 808 (1941). Of course, the security of transactions is just one among many functions performed by the institution of rights. See also Raz, Book Review, 95 Harv. L. Rev. 916, 936 (1982):

> The objective test of contract formation is not an embarrassment to the view that the purpose of contract law is to support the practice of undertaking voluntary obligations. On the contrary, it is required by it. Paradoxical though it

towards honoring the actual intentions of the parties. But where the subjective intentions of one party have not been manifested to the other, only the "reasonable" or objective interpretation of the commitment will establish the clear boundaries required by an entitlements approach.

There is nothing novel or revolutionary about contract law's concern for the protection of reliance by promisees. One of the most important functions of the institution of property rights is to legally protect certain expectations of the rights holder so that she may rely on the continued use of certain resources. For example, an owner of real property relies upon her title when she invests in building a house or a factory upon it, because she expects that her title will be honored by a legal system in the future. She also relies upon her title when she leaves town on vacation, expecting her property to still be hers when she returns.

In a consent theory, reliance on the words or deeds of another is "justified" only (1) when and to the extent that such words or deeds have a commonly understood meaning within the relevant context or when a special meaning can be shown to have been understood by both parties to this transaction, and (2) when this meaning indicates a consent to transfer legitimately acquired and alienable rights. The hard work facing any legal system based on entitlements includes determining what constitutes "valid" title and what acts constitute "consent." Only when these concepts are properly defined can we "expect" the legal system to act in a predictable enough manner to make our reliance "reasonable" or "justified."

2. *The Proper Limits of the Objective Approach.* — A consent theory also explains the limits of the objective approach—why the objective interpretation of a party's acts will yield, at times, to proof of a different subjective understanding of one or both parties.[154]

To find the presence of consent, what matters is the meaning that is generally attached to some given word or conduct indicating assent—a meaning to which both parties have access. In contract law, this generalized meaning therefore becomes the *presumptive* meaning.[155] The presumption can be rebutted, not by reference to the promisor's subjective intent in performing the consenting acts, but either by proof of any special meaning that the parties' behavior reveals they held *in common*, thereby negating the social function of accepting the generalized

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sounds, it is in order to protect the practice from abuse and debasement that the law recognizes the validity of contracts that are not voluntary obligations.

154. See Eisenberg, supra note 140, at 1117–27 (discussing what limits should properly be placed on the applicability of the objective approach).

155. See Restatement (Second) of Contracts § 201 comment a (1979) ("Words are used as conventional symbols of mental states, with standardized meanings based on habitual or customary practice. Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning.").

meaning,[156] or by the promisor's proof that the listener did not actually understand the "reasonable" meaning to be the intended meaning.[157] A promisee is not "justified" in relying on the ordinary meaning of a promisor's words or deeds where a special meaning can be proved to have been actually understood by both parties. Similarly, the enforcement of the "reasonable" meaning serves no constructive purpose where it was not the promisee's actual understanding.[158] The boundary-determining function[159] of a rights analysis simply does not require that such reliance be protected or such a meaning enforced.[160]

This also explains why the misuse of a particular term by party *A* who was unaware of its ordinary meaning would not bind *A* if it could be shown that *B*, the other party, was made aware of this mistake by the circumstances of the transaction.[161] Proof of this occurrence would show that the normal boundary-defining function of an objective approach designed to protect parties in *B*'s position had been satisfied by *B*'s actual knowledge of *A*'s meaning. A consent theory, therefore, explains both why parties are free to shift away from the ordinary meanings of words or deeds either intentionally or inadvertently, and why, if a shift by both cannot be shown, the ordinary or "objective" meaning will govern.

Persons generally use conventional words and actions to convey their intentions with a considerable degree of accuracy. Because of this, the outcomes of cases decided by an objective approach based

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156. See, e.g., Weinberg v. Edelstein, 201 Misc. 343, 345, 110 N.Y.S.2d 806, 808 (Sup. Ct. 1952) (A court cannot "rely upon naked dictionary definitions" but must determine meaning according to "the practices and customs of the trade."); Restatement (Second) of Contracts § 201 comment a (1979). But cf. id. § 201 comment c ("But parties who used a standardized term in an unusual sense obviously run the risk that their agreement will be misinterpreted in litigation.").

157. Permitting a promisor to contest whether a promisee had in fact relied upon the objective meaning is quite consistent with the boundary-defining function of contract law in a consent theory. Assuming that a promisor can prove such an allegation, the reliance that the objective approach is designed to protect is nonexistent, and permitting such proof would provide few opportunities for fraud. In this regard a consent theory conforms to the conventional interpretation of the objective theory. See, e.g., Embry v. Hargadine, McKittrick Dry Goods Co., 127 Mo. App. 383, 392, 105 S.W. 777, 780 (1907) (holding that defendant is liable for breach of contract if a reasonable person would have understood him as having accepted plaintiff's offer and plaintiff in fact so understood defendant).

158. See E. Farnsworth, supra note 13, § 7.9, at 483–92.

159. See supra notes 139–40 and accompanying text.

160. Cf. E. Farnsworth, supra note 13, § 7.9, at 484 ("Since a contract involves two parties, however, the search for meaning begins with the meaning attached by both parties to the contract language; each needs the other's assent."); U.C.C. § 1-201(3) (1978) (" 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act.").

161. See, e.g., Restatement (Second) of Contracts § 153 (1979) (specifying when mistake of one party makes a contract voidable).

upon the ordinary and natural meaning of words and other assertive conduct will differ from those decided by a subjective approach only in unusual circumstances. Most cases would come out the same in either event. But unlike a will theory, a consent theory, because it is based on fundamental notions of entitlements, can explain both why we generally enforce the objective manifestation of consent when it differs from subjective intent and the exceptions where evidence of subjective intent will prevail.

C. *Determining Contractual Obligation in a Consent Theory*

1. *The Presumptive Nature of Consent.* — Richard Epstein has suggested that legal principles used to determine obligation can best be thought of as presumptive in nature.[162] That is, legal principles which attempt to describe in a general fashion what obligations will result from certain actions ought not to be applied in an "absolute" fashion. Rather, legal principles ought to state a "prima facie case" of legal obligation that describes the normal or presumptive connection between specified acts and their legal consequences.[163] Any such presumption of obligation, however, may be "rebutted" if other facts are proved to have existed that are generally recognized by a legal system as undermining the normal significance of the prima facie case. Such responses or "defenses" to the prima facie case are themselves only presumptively compelling. They in turn may be rebutted by still other facts alleged by the person seeking relief. In this way the principles or elements that determine legal obligation come in "stages."[164]

In a consent theory, absent the assertion of a valid defense, proof of consent to a transfer of alienable rights (plus breach) is legally sufficient to obtain a judgment for breach of contract. Consent is prima facie binding because of its usual connection with subjective assent (thereby protecting the reliance interest of the promisor) and because people usually have access only to the manifested intentions of others

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162. See Epstein, Pleadings and Presumptions, 40 U. Chi. L. Rev. 556 (1973) (describing the operation of staged pleadings in legal analysis); cf. Eisenberg, supra note 1, at 641 ("Putting the problem in the language of civil procedure, the principles that address the enforceability of promises should determine whether breach of a given type of promise gives rise to a legal complaint. Issues concerning the quality of individual promises should then be matters of defense.").

163. An approach that constructs presumptively applicable legal rules—the prima facie case—based on "normal" circumstances and then allows certain defenses based on "abnormal" circumstances that undercut the appropriateness of the prima facie case would serve to minimize (though perhaps not entirely eliminate) the problem of the "open texture" of general rules that was noted supra note 85 and accompanying text.

164. Cf. Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. Legal Stud. 165 (1974) (offering an expanded description of those circumstances that rebut the normal presumption embodied in the prima facie case of tort that persons will be held strictly liable for the injuries they cause); Epstein, supra note 152, at 166–74 (having volitionally caused harm to another, *A* is prima facie liable for the injury, but, if *A* successfully pleads a valid defense, *B* may not be entitled to a judgment).

(thereby protecting the reliance interest of the promisee and others as well as the "security of transactions"). The next two sections will discuss the prima facie case of consent and the role that defenses to consent play in a consent theory.

2. *Establishing the Prima Facie Case of Consent.* — There are two ways to manifest one's intention to be legally bound. The first is to deliberately "channel" one's behavior through the use of a legal formality[165] in such a way as to explicitly convey a certain meaning—that of having an intention to be legally bound—to another. This is the formal means of consenting. The second is by indirectly or implicitly conveying this meaning by other types of behavior. This is the informal means of consenting.

a. *Formal Consent.* — For a considerable part of the history of the common law, the principal way of creating what we now think of as a contractual obligation was to cast one's agreement in the form of a sealed writing.[166] Actions based on informal promises were subject to the defense of wager, and this seriously undermined a promisee's ability to obtain enforcement.[167] The rise of the action of assumpsit can be understood as the way common law judges responded to competitive pressures[168] to escape this (and other) procedural barriers to the enforcement of informal promises.

As was noted above,[169] however, the emergence of assumpsit as the principal action of contractual enforcement required the development of a doctrinal limitation on the enforcement of commitments—that is, the doctrine of consideration.[170] This development eventually resulted in the ascendancy of the bargain theory of consideration, which had the unintended consequence of creating doctrinal problems for the enforcement of formal commitments where there was no bargained-for consideration. Notwithstanding their ancient history, formal commitments, such as those under seal, came to be thought of as "exceptions" to the "normal" requirement of consideration. Expressions such as "a seal imports consideration" or is "a substitute for consideration" became commonplace.[171]

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165. See Fuller, supra note 153, at 801 (The use of legal formality "offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.").

166. See A. Simpson, supra note 75, at 88–90.

167. Id. at 137–44.

168. See Helmholz, Assumpsit and *Fidei Laesio*, 91 Law Q. Rev. 406 (1975) (describing the competition between the common law courts and the ecclesiastical courts in the enforcement of informal promises).

169. See supra notes 73–75 and accompanying text.

170. The Statute of Frauds, passed in 1677, was another such limitation. See A. Simpson, supra note 75, at 599–600.

171. See, e.g., In re Conrad's Estate, 333 Pa. 561, 563, 3 A.2d 697, 699 (1938); Aller v. Aller, 40 N.J.L. 446 (1878); cf. Crane, The Magic of the Private Seal, 15 Colum. L. Rev. 24, 25–26 (1915) ("The books frequently spoke of a seal as implying a considera-

Despite such cases and restatements,[172] formal promises have had an uncertain place in the law of contract[173] because they lacked a theoretical underpinning. In a climate of opinion dominated by notions of "bargain" and "induced reliance," where there is no bargain and no demonstrable reliance to support enforcement, the presence of a meaningful formality may not be enough to satisfy a court.[174] Not even the renowned contract writings of Lon Fuller[175] were able to change the formal contract's orphan status.

A consent theory of contract, however, provides the missing theoretical foundation of formal contracts and explains their proper place in a well-crafted law of contract. The voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in as unambiguous a manner as possible. As one court noted:

> If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality?[176]

Formal contracts ought to be an "easy" case of contractual enforcement, but prevailing theories that require bargained-for consideration, induced reliance, or even economic "efficiency" would have a hard time explaining why.[177] In a consent theory, by contrast, there need be no

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tion; but the correct statement of the rule is that a sealed instrument required no consideration." (footnote omitted)).

172. See, e.g., Restatement (Second) of Contracts § 95 (1979) (specifying conditions necessary for a sealed writing to be binding without consideration).

173. See C. Fried, supra note 8, at 28–29 ("[T]he trend away from the seal as an anachronistic relic and the narrow, episodic nature of the statutory exceptions leaves the doctrine of consideration as very much the norm.").

174. It is difficult to determine how much of this decline is due to theoretical reasons and how much is due to the uncertain significance of certain formalities claimed to constitute seals. Compare Chancellor Kent's opinion in Warren v. Lynch, 5 Johns. 239, 245–46 (N.Y. 1810) ("A scrawl with a pen is not a seal, and deserves no notice . . . . The calling a paper a deed will not make it one, if it want the requisite formalities . . . . The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practiced upon the unwary.") with 1892 N.Y. Laws, ch. 677 § 13 ("The private seal of a person . . . to any instrument or writing shall consist of . . . the word 'seal,' or the letters 'L.S.,' opposite the signature."). See also Eisenberg, supra note 1, at 660 (describing the erosion of "the elements of ritual and personification"); Fuller, supra note 153, at 823 (questioning "whether with our present-day routinized and institutionalized ways of doing business a 'blanket formality' can achieve the desiderata which form is intended to achieve.").

175. See Fuller, supra note 153, at 822–23 ("The desiderata underlying the use of formalities will retain their relevance as long as men make promises to one another.").

176. Aller v. Aller, 40 N.J.L. 446, 451 (1878); see also Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 194 (1925) ("I don't see why a man should not be able to make himself liable if he wishes to do so." (statement of S. Williston)).

177. For example, when there is no separate consideration for making an offer irrevocable for a certain period of time, a bargain theory of consideration would have a

underlying bargain or demonstrable reliance for such a commitment to be properly enforced.

The same holds true—as Lon Fuller again recognized—for nominal consideration and for false recitals of consideration.[178] A consent theory acknowledges that, if properly evidenced, a recital by the parties that "consideration" exists may fulfill the channeling function of formalities, whether or not any bargained-for consideration for the commitment in fact exists. If it is widely known that the written phrase "in return for good and valuable consideration" means that one intends to make a legally binding commitment, then these words will fulfill a channeling function as well as, and perhaps better than, a seal or other formality.[179] The current rule that the falsity of such a statement permits a court to nullify a transaction because of a lack of consideration[180] is therefore contrary to a consent theory of contract.[181]

b. *Informal Consent.* — Consent to transfer rights can be express or implied. Formal contracts expressing consent to transfer alienable rights pose no problem for a consent theory. The enforcement of informal commitments where evidence of legally binding intentions is more obscure, however, has plagued contract law for centuries.[182] In such agreements courts must infer assent to be legally bound from the circumstances or the "considerations"[183] or "causa"[184] that induced the parties' actions.

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difficult time explaining the enforceability of such "firm offers" as are recognized by U.C.C. § 2-205 (1977), which requires neither consideration nor detrimental reliance for enforcement to be obtained.

178. See Fuller, supra note 153, at 820 ("The proper ground for upholding these decisions would seem to be that the desiderata underlying the use of formalities are here satisfied by the fact that the parties have taken the trouble to cast their transaction in the form of an exchange.").

179. See Eisenberg, supra note 1, at 660–61 ("[I]t can be safely assumed that parties who falsely cast a nonbargain promise as a bargain do so for the express purpose of making the promise legally enforceable.").

180. See Restatement (Second) of Contracts § 71 comment b (1979); see, e.g., Schnell v. Nell, 17 Ind. 29, 32 (1861) ("The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so."); Shepard v. Rhodes, 7 R.I. 470, 475 (1863) (Consideration of one dollar was "a mere *nominal* consideration." (emphasis in original)).

181. But see Restatement (Second) of Contracts § 87(1)(a) (1979) (qualifying the prohibition of § 71 to permit recitals of purported consideration to render a "firm" offer enforceable as an option contract).

182. See Lorenzen, supra note 144, at 646 (criticizing limits placed by Anglo-American law on ways in which "intent to assume an obligation" can be shown).

183. On this archaic usage of the word "consideration," see A. Simpson, supra note 75, at 321 ("Pleadings in assumpsit had always included matters of inducement.").

184. For the possible parallels between consideration and the civilian concept of "causa," see Mason, The Utility of Consideration—A Comparative View, 41 Colum. L. Rev. 825, 825–31 (1941); cf. Lorenzen, supra note 144, at 646 ("There is in reality no definable 'doctrine' of *causa*.").

(i) *Bargaining as Evidence of Consent.* — Within a consent theory, bargained-for consideration would perform a channelling role.[185] The fact that a person has received something of value in return for a "promise" may indeed indicate that this promise was an expression of intention to transfer rights.[186] Moreover, in some circumstances where gratuitous transfers are unusual, the receipt of a benefit in return for a promise should serve as objective notice to the promisor that the promise has been interpreted by the other party to be legally binding.[187]

Although the existence of a bargain or other motivation for a transaction may be good evidence of the sort of agreement that has been made, in a consent theory the absence of consideration does not preclude the application of legal sanctions if other indicia of consent are present. To return to the examples given by Fried,[188] if it can be proved that a party voluntarily consented to be legally bound to keep an offer to transfer rights open, to release a debt, to modify an obligation, or to pay for past favors, these commitments are enforceable (provided that other contract requirements such as acceptance are met).

Where bargaining is the norm—as it is in most sales transactions—there is little need for the law to require explicit proof of an intent to be legally bound, such as an additional formality,[189] or even proof of the existence of a bargain. In such circumstances, if an arms-length agreement to sell can be proved, there presumptively has been a manifestation of intent to be legally bound. For this reason, the Uniform Commercial Code's stricture that "[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract"[190] is entirely consonant with a consent theory.

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185. Cf. Restatement (Second) of Contracts § 75 comment a (1979) ("Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain . . . tends to satisfy the cautionary and channelling functions of form.").

186. Cf. P. Atiyah, supra note 123, at 184 ("[A] very common justification for treating a promise as binding is that the promise is evidence, is an admission, of the existence of some other obligation already owed by the promisor. By making an explicit promise, the promisor concedes or admits the existence and extent of the preexisting obligation.").

187. The duties, if any, that receipt of a nongratuitous benefit imposes on the recipient are beyond the scope of this Article, except to note that such receipt may manifest the recipient's intent to be legally bound to a contemporaneous commitment.

188. See supra note 77 and accompanying text. Note that in most of these cases formalities adequate to indicate consent were present.

189. See Fuller, supra note 153, at 806 (The channelling function of formality "has no place where men's activities are already divided into definite, clear-cut business categories . . . . It is for this reason that important transactions on the stock and produce markets can safely be carried on in the most 'informal' manner."). Formality might well be required, however, if it were the trade custom or if the transaction was particularly large or unusual in some other respect.

190. U.C.C. § 2-204 (1977).

In a legal system animated by a consent approach, the recognition that "consideration" is only presumptive evidence of consent and that consent can be shown by other means might produce results that correspond remarkably to current practice. To avoid unnecessary confusion and error, however, it is important to understand the theoretical framework.[191]

(ii) *Reliance as Evidence of Consent.* — A consent theory also identifies those circumstances where the presence of reliance provides an adequate substitute for the traditional requirement of consideration. If the primary function of consideration is to serve as one way of manifesting assent to be legally bound, and not as a requirement of a prima facie case of contractual obligation, then asserting the equivalence of reliance and consideration[192] is less problematic. Expenditures made by a promisee in reliance on the words and conduct of the promisor may prove as much about the nature of this transaction as the existence of consideration, especially where the reliance is or should be known to the promisor.[193]

Suppose that *A* makes a substantial promise to *B*—for example, a promise to convey land. The promise is clear, but it is ambiguous as to its intended legal effect. Does *A* intend to be bound and subject to legal enforcement if she reneges, or is she merely stating her current view of her future intentions? Now suppose that *B* announces to *A* his intention to rely on *A*'s promise in a substantial way—for example, by building a house on the land—and that *A* says nothing. Suppose further that *B* commences construction and observes *A* watching in silence. It would seem that under such circumstances *A*'s ambiguous legal intent has been clarified. By remaining silent in the face of reliance so substantial that *B* would not have undertaken it without a legal commitment from *A*—*A* could not reasonably have believed that *B* intended to make a gift to her of the house—*A* has manifested an intention to be legally bound.[194]

In this manner, a promisor's silence while observing substantial reliance on the promise by the promisee can manifest the promisor's as-

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191. As Fuller, supra note 153, at 824 concludes:

> [A]n original attack on these problems would arrive at some conclusions substantially equivalent to those which result from the doctrine of consideration as now formulated. What needs abolition is not the doctrine of consideration but a conception of the legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves. When we have come again to define consideration in terms of its underlying policies the problem of adapting it to new conditions will largely solve itself.

192. See, e.g., P. Atiyah, supra note 123, at 184–89.

193. See id. at 192–95 (discussing the evidentiary value of reliance on a promise).

194. See, e.g., Greiner v. Greiner, 293 P. 759 (Kan. 1930); Seavey v. Drake, 62 N.H. 393 (1882); Roberts-Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922). In each of these cases, the promisor remained silent in the face of substantial reliance on a promise to convey land. The courts granted relief despite the lack of bargained-for consideration.

sent to the promisee.[195] In a consent theory, if consent is proved, then enforcement is warranted even if a bargain or a formality is absent.

As was discussed above,[196] when we seek to discern "reasonable" (or prudent) reliance on a promise, a conclusion cannot be reached that is independent of the perceived enforceability of the promise, which brings us full circle to the question of enforceability with which we started. A theory based only on reliance cannot, therefore, answer this question. By contrast, in a consent theory, reliance is legally protected (and therefore deemed to be justified) only if it is reliance on a manifested intention to be legally bound.[197] Reliance on a commitment that is something less than a manifested intention to be legally bound is not legally protected and is undertaken at the promisee's own risk.

The only assessment of "reasonableness" that is required in a consent theory of contractual obligation is an assessment of the "reasonable," or probable, *meaning* of the promisor's words and conduct. However difficult such an interpretive inquiry into meaning might sometimes be, it is not plagued with the same kind of circularity that attaches to an assessment of "reasonable reliance." Interpretation of meaning in the contractual context is a matter of determining either (a) the usual nonlegal meaning of words, (b) the special meaning of legal terms of art or formalities that have been freely employed by the parties,[198] or (c) some other special meaning jointly understood by the parties.[199] In any event, this is the sort of inquiry all of us routinely engage in every day when we communicate.[200]

By providing a clearer criterion of enforceability *that is available to the parties*, a consent theory encourages informed action. Once the legal standard for contractual enforcement is known to be consent, who is to

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195. Cf. McCormick on Evidence § 270, at 799 (3d ed. 1984) ("If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission." (footnote omitted)).

196. See supra notes 20–25 and accompanying text.

197. This is subject to the qualification that courts will enforce subjective agreement where it is proved. See supra note 156 and accompanying text.

198. An ideal formality is an act that is so bizarre that it has no "normal" meaning other than the legal one, so that no "reasonable" person who did not intend the legal effect would ever have performed the act. Lighting a candle and dripping the wax on a document and then impressing in the wax one's seal was an act of a suitably bizarre nature. When a "sealed" document could be executed by preprinting the letters "L.S." after the place for a signature, the act quite obviously lost this character. See supra note 174.

199. This meaning would include any special usages employed within a particular community. See, e.g., Weinberg v. Edelstein, 201 Misc. 343, 345, 110 N.Y.S.2d 806, 808 (Sup. Ct. 1952).

200. See H.L.A. Hart, supra note 85, at 123 ("General terms would be useless to us as a medium of communication unless there were . . . familiar, generally unchallenged cases.").

say what conduct is then "reasonable" or prudent? It may be prudent to rely on a commitment that is known to be unenforceable, given other things that the promisee may know about the promisor, or it may not. This is not for a court to decide. It should by now be clear, however, that a consent theory would identify instances of contractual obligation that a bargain theory would ignore and thereby would better protect and facilitate reliance: one need not have relied on a bargain to be protected in a consent theory.

Once it is determined that reliance is protected because (and therefore when) it is based on consent, a court must still decide *how much* reliance is to be protected—that is, what is the extent of liability for consequences caused by a breach of an admittedly enforceable obligation?[201] The standard approach is to adopt a "foreseeability"[202] assessment of liability that is much the same kind of prudential or predictive judgment that is employed in assessing the existence of reliance-based obligation: what would a promisor have reasonably expected a promisee to have done in reliance on the contract? But much the same problem exists for this issue of liability that was seen above with respect to the issue of obligation.[203] Here, as there, what most persons will do depends on their perception of what the legal rule is concerning the extent of liability, and therefore such a prediction cannot itself determine the legal rule.

Just as a consent theory addresses the problem of obligation by employing the criterion of "consent to obligation," it would handle the problem of extent of liability by employing the criterion of "consent to liability." This is much the same answer as was suggested by Justice Holmes in *Globe Refining Co. v. Landa Cotton Oil Co.*[204] and has been called the "tacit-assent" test.[205]

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201. See Eisenberg, supra note 1, at 651 ("[T]he determination of what *kinds* of promises the law should enforce is tightly linked with the *extent* to which various kinds of promises should be enforced." (emphasis in original) (footnote omitted)).

202. See, e.g., Hadley v. Baxendale, 9 Ex. 341, 355, 156 Eng. Rep. 145, 151 (1854).

203. See supra notes 19–25 and accompanying text.

204. 190 U.S. 540, 545 (1903) (knowledge of extent of liability " 'must be brought home to the party sought to be charged, under such circumstances that he *must know* that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it' " (emphasis added) (quoting British Columbia Saw-Mill Co. v. Nettleship, 3 L.R.-C.P. 499, 509 (1868)); see also Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 286–87, 79 S.W. 1052, 1056 (1904) (employing tacit assent test); O. Holmes, The Common Law 236–37 (M. Howe ed. 1963) ("[N]otice, even at the time of making the contract, of the special circumstances out of which special damages would arise in case of breach, is not sufficient unless the assumption of that risk is to be taken as having fairly entered into the contract."); C. McCormick, A Handbook on the Law of Damages § 141, at 578–79 (1935) (citing other cases that follow *Globe* in employing a tacit assent test).

205. See E. Farnsworth, supra note 13, § 12.14, at 875 (describing the tacit assent test and noting that it has been rejected by most jurisdictions); U.C.C. § 2-715 comment 2 (1977) ("The 'tacit agreement' test for the recovery of consequential damages is re-

While some have objected to the often fictional nature of such "tacit" consent,[206] the source of this problem lies not with a consent theory. It lies instead with the centuries-old judicial reluctance to enforce express clauses that specify the extent of liability where such clauses differ from the standard for damages that the courts would apply on their own.[207] With this as the legal background, why would rational economizing parties negotiate such a clause unless they strongly disagreed with that background *and* could devise a way to subvert it? By recognizing contracting parties' right to consent to extent of liability as well as to obligation, we can anticipate fictional "tacit" assent to be supplanted by actual agreements—whether implied or expressed—when parties disagree with the background rule established by the courts.[208]

To the extent, however, that parties *can* freely "opt out" of complete liability for all forseeable consequential damages, the adopting of a consent theory in this area is less pressing than it is at the level of obligation. For most parties know that they are entering into a contract and, if so, they can and do provide for clauses that limit by consent the consequences for which they may be liable. In contrast, if a consent theory is not employed to assess the existence of an obligation, parties who do not know that they are contracting cannot always or easily take steps to avoid an obligation that might be imposed upon them.

In sum, bargained-for consideration and nonbargained-for reliance are equivalent to the extent that the existence of either in a transaction may manifest the intentions of one or both of the parties to be legally bound. In any case, the absence of either bargained-for consideration or reliance will not bar the enforcement of a transfer of entitlements that can be proved in some other way—for example, by a formal written document or by adequate proof of a sufficiently unambiguous verbal commitment.[209]

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jected."). But see Murrow v. First Nat'l Bank, 261 Ark. 568, 550 S.W.2d 429 (1977) (retaining tacit-assent test).

206. See, e.g., C. McCormick, supra note 204, § 141, at 580 ("It adds the fiction of a tacit promise to the original fiction of 'contemplation'. . . .").

207. See Note, Liquidated Damages Recovery Under the Restatement (Second) of Contracts, 67 Cornell L. Rev. 862, 866 (1982) ("Where the actual damage resulting from a breach was small or nonexistent, some courts used equitable principles to avoid enforcing a liquidated damage clause." (citation omitted)); see also A. Simpson, supra note 75, at 118–25 (describing the decline of conditioned penal bond).

208. See, e.g., A. Polinsky, supra note 28, at 25 (contract law provides gap-filling terms that minimize the costs of transacting by accommodating the intentions of most parties); R. Posner, supra note 30, at 69 (One economic function of contract law "is to reduce the complexity and hence the cost of transactions by supplying a set of normal terms that, in the absence of a law of contracts, the parties would have to negotiate expressly.").

209. It is not being suggested here that such prophylactic measures that serve an evidentiary function—such as a statute of frauds, a parol evidence rule, or certain formal requirements—are inappropriate in a consent theory. Cf. Lorenzen, supra note 144, at

3. *Contract Defenses: Rebutting the Prima Facie Case of Consent.* — Consent, either formal or informal, is required to make out a prima facie case of contractual obligation. This means that, in the absence of an "affirmative" defense to the prima facie case of contractual obligation, the manifested intention of a party to transfer alienable rights will justify the enforcement of such a commitment. Traditional contract defenses can be understood as describing circumstances that, if proved to have existed, deprive the manifestation of assent of its normal moral, and therefore legal, significance. These defenses may be clustered into three groups, each of which undermines the prima facie case of consent in a different way.

The first group of defenses—duress, misrepresentation, and (possibly) unconscionability[210]—describes circumstances where the manifestation of an intention to be legally bound has been obtained improperly by the promisee. The manifestation of assent either was improperly coerced by the promisee[211] or was based on misinformation for which the promisee was responsible.[212] The second group—incapacity, infancy, and intoxication—describes attributes of the promisor that indicate a lack of ability to assert meaningful assent. The third group—mistake, impracticability, and frustration—stem from the inability to fully express in any agreement all possible contingencies that might affect performance. Each describes those types of events (a) whose nonoccurrence was arguably a real, but tacit assumption upon which consent was based, and (b) for which the promisee should bear the risk of occurrence.[213] Each type of defense thus is distinguished by the way it undermines the normal, presumed significance of consent. But all valid contract defenses describe general circumstances where the appearance of assent tends to lack its normal moral significance.

These traditional contract defenses would function in a consent theory, as they do currently, to preserve the actual voluntariness of rights transfer, in those rare cases where consent has been improperly coerced or where we are willing to acknowledge other circumstances,

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644 (The law may "require certain formalities for the prevention of fraud, or as a guarantee, so far as it is legally possible to provide such, that the contract in question represents the serious and deliberate will of the parties. But within the limits so outlined it is submitted the will of the parties to assume legal relations should control.").

210. For analyses of unconscionability that would place it in this category of defenses, see Epstein, supra note 54; Leff, supra note 54.

211. See generally Philips, Are Coerced Agreements Involuntary, 3 Law & Phil. 133 (1984) (distinguishing coerced and involuntary agreements).

212. Cf. Epstein, Privacy, Property Rights, and Misrepresentations, 12 Ga. L. Rev. 455, 466 (1978) ("False words . . . undermine the voluntariness of the individual's conduct . . . .").

213. In this third group of defenses, the consent was not improperly induced by the promisee, and the person giving consent was capable of doing so. This, in part, may help explain why courts are quite receptive to arguments by the promisee that the promisor assumed the risk of the mistake, impracticability, or frustration. See E. Farnsworth, supra note 13, §§ 9.3–.4, 9.6–.7, at 659–61, 666, 684–86, 692–94.

such as misinformation, that vitiate the presence of consent. This refusal to enforce some instances of apparent assent does not, however, reflect a retreat to a subjective will theory. It remains true that an objective manifestation of intent to be legally bound is sufficient to give rise to an enforceable commitment. The only qualification is that this objective manifestation must have been voluntary.[214]

A consent theory explains both the modern reception of the objective theory in the prima facie case of contractual obligation and the traditional defenses to the prima facie case which are based on circumstances that in some significant fashion rebut the usual voluntary nature of consent. When such circumstances are proved to have existed, even a manifested assent to be legally bound does not justify enforcement.

CONCLUSION: A CONSENT THEORY IN PERSPECTIVE

A consent theory of contractual obligation views certain agreements as legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights. This approach accurately captures what is at stake when individuals seek to exchange or bestow entitlements that they have acquired or will acquire. It provides a coherent account of both the traditional common law preference for an objective interpretation of contracts and its exceptions.

A consent theory dictates both that a showing of consent is sufficient (prima facie) to obtain enforcement and that defenses that show circumstances which undermine the moral significance of objective consent are warranted. A consent theory also provides a focus for contemporary dissatisfaction with the doctrine of consideration, while putting into better perspective the recognized need to enforce some gratuitous commitments and to protect some acts of reliance that were not bargained for. What of the five "principles" of contract discussed in Part I? A consent theory specifies the proper relationship among these core concerns of contract law. In this way, it helps determine which principle or concern should be given priority in different situations.

A consent theory's concern with the issue of individual *will* and *autonomy* is reflected in the manner by which consent is determined—the theory looks for a manifestation of intention to be legally bound. Contractual enforcement, therefore, will usually reflect the will of the parties. Unlike a will theory, however, a consent theory explains the enforcement of manifestations of assent that are contrary to the actual intent of one party. A consent theory, like a reliance theory, legally

214. See Cohen, supra note 7, at 578:

> A developed system of law . . . must draw some distinction between voluntary and involuntary acts. . . . The whole of the modern law of contract, it may be argued, thus does and should respond to the need of greater or finer discrimination in regard to the intentional character of acts. The law of error, duress and fraud in contract would be unintelligible apart from such distinction.

protects a promisee's *reliance* on a promisor's consent even in some instances where a promisor did not subjectively intend to be bound. A consent theory differs from a reliance theory by offering a workable criterion independent of reliance itself[215] to distinguish legally protected from legally unprotected reliance.

A consent theory facilitates *efficient* resource distribution by legally protecting consensual exchanges. Such consensual exchanges produce vital and otherwise unavailable information about value and thereby enable resources to gravitate to their highest value user. However, a consent theory refuses to approve nonconsensual transfers regardless of the alleged "efficiency" of such transfers. A consent theory also avoids the extreme indeterminacy of a substantive fairness approach, while protecting that concept of *fairness* that is not a phantom—procedural fairness—by its reliance on generally formulated principles of contract formation and avoidance.

Finally, though a consent theory acknowledges that, under certain circumstances, by *bargaining* and incurring unbargained-for *detrimental reliance* parties can manifest assent to transfer rights, it also recognizes the dependent relationship between contract theory and entitlement theory. In this way, a consent theory avoids the dangers of basing contractual obligation entirely on either bargain or reliance.

How does a consent theory fit into the typology of contract theories suggested in Part I? A consent theory of contract is an entitlements theory and therefore it bases legal obligation upon the rights of the parties. In contrast to one-sided party-based theories, a consent theory stresses the interrelational function of contract law. The criterion of enforceability—a manifested intention to be legally bound—respects the interests of both parties. A corollary of the manifestation requirement is that the meaning of a promisor's conduct is interpreted from the perspective of (reasonable) promisees. Requiring that it is an intention to be legally bound that must be manifested protects the autonomy of promisors.

Further, a consent theory acknowledges that substantive concerns arising at the level of entitlements—for example, a distinction between alienable and inalienable rights—can affect the enforceability of certain commitments. Yet a consent approach eschews the sorts of substantive inquiries into and interference with ordinary contractual arrangements that substance-based theories demand. Finally, a consent theory supports the traditional recognition that certain processes—such as bargaining or using a seal—give rise to a heavy presumption of enforceability. Unlike a process-based theory, a consent theory clearly specifies its dependence on underlying notions of entitlements that enable a legal system to choose which processes to recognize and to know when procedural requirements should be overridden.

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215. See supra notes 197–200 and accompanying text.

In describing the acceptance of new scientific theories, Thomas Kuhn has noted that the fact that new theories cannot initially answer all questions that may be put to them does not prevent them from supplanting old theories.[216] Rather, new theories are accepted because they explain known truths and resolve previously vexatious anomalies, and provide promising new areas of research.[217] By these criteria, a consent theory should be considered a potentially valuable approach to explaining contractual obligation.

Still, the theory must be further extended and elaborated before it can be fully evaluated. For example, the recognition that contractual obligation is dependent on a deeper notion of individual entitlements promises an explanation of why some rights might by their nature be inalienable and therefore why some consensual agreements might be unenforceable. This understanding may also assist in determining which form of contract remedies—specific performance or monetary damages—is appropriate if a contract is breached.[218]

The purpose of this Article is not to end discussion of contract theory or doctrine, but rather to permit the ongoing discussion of contractual obligation to emerge from its longstanding intellecutal cul-de-sac and begin traveling a more productive course. If the "death of contract" movement is a product of a disillusionment with and abandonment of both the will theory of contract as a distinct source of contractual obligation and the bargain theory of consideration as the means of formally distinguishing between enforceable and unenforceable exercises of the will, the "resurrection of contract" is a recognition of contract law's proper function as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlements. A better understanding of contractual obligation should ultimately result in rules and principles of contract that better facilitate the important social need to make and rely upon enforceable commitments. These and other promises of the consent theory await future performance.

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216. T. Kuhn, The Structure of Scientific Revolutions 157–59 (2d ed. 1970).

217. Id. at 169.

218. See, e.g., Barnett, supra note 99 (discussing how a consent theory of contract and a proper distinction between alienable and inalienable rights suggest that the rules governing choice of remedies should vary depending on which of three kinds of contracts has been breached: a contract for external resources, a contract for personal services, or a contract for corporate services).