CONSENT AND DISAGREEMENT

*Aditi Bagchi**

Contracts purport to settle rights and obligations between parties. The fact that parties have consented to a given set of terms seems to hold the promise of preempting conflict about those terms after the fact. But contract gives rise to disputes about consent itself. Many disputes about implied conditions, for example, are best understood as disagreements about the scope of consent.

This article identifies several moral ambiguities in the concept of consent. We not only disagree about the analytic merits of competing conceptions among ourselves but, even as individuals, we tend not to endorse and consistently apply a single version of the concept. Psychologists use the "availability heuristic" to describe how we rely on salient facts when making quick probabilistic judgments. Similarly, the availability of some facts but not others prompts us to default to the version of an ambiguous moral concept that we are in a position to operationalize. On the flip side, we discount understandings of consent that fail to guide us given the facts we know.

The distinct sets of facts available to the giver and receiver of consent, respectively, thus direct them to rely on different conceptions of consent, thereby driving a systematic wedge between how parties to exchange are likely to understand the bindingness of their agreement. Contract law privileges a single, potentially unifying conception of consent; but that conception must compete with the complex understanding of the concept that we each bring from our lives outside of contract. Without the benefit of clear legal rules, consent in other social contexts generates still more frequent and deeper disagreement. Within the domain of contract, we should recognize that the concept of concept does not eradicate either disagreement or its underlying moral ambuity. We should react systemically with contextualized legal rules and, in some cases, flexible application of those rules.

---

* Wilkinson Professor of Law, Fordham University Law School. Thanks to participants in workshops at ETH Zurich, Fordham University Law School, Queen's University, University of Girona, University of Surrey, and Washington & Lee University Law School for their helpful comments. Special thanks to Stephen Bero, Avihay Dorfman, Benjamin Ewing, Larissa Katz, Will Kymlicka, Alexander Morell, Jessica McMullin, Daniel Peixoto Murata, Diego Papayannis, Kish Parella, Alexander Stremitzer, Sabine Tsuruda, Gregoire Webber, and Tess Wilkinson-Ryan.

TABLE OF CONTENTS

In November 2019, Christopher Martorella entered an agreement to purchase a property.[1] The contract had no financing condition, and closing was scheduled for March 16, 2020.[2] His wife Laura Martorella applied for a mortgage, but the pandemic delayed its processing by the bank.[3] The sellers agreed to postpone closing by three weeks but, before it occurred, Laura Martorella was hospitalized with COVID-19.[4] The sellers refused to delay closing further without increasing the deposit payment.[5] Chistopher Martorella refused to alter the original terms and was unable to close on time.[6] He sued to get his deposit back. He was out over $180,000.[7]

Did Mortella agree to buy the property even if his wife was severely ill? Was his promise to buy still binding after she was hospitalized? The seller thought so, and the Massachusetts state court agreed.[8] But Martorella did not understand his obligation to buy as unconditional; he came out feeling cheated by the seller.[9] Ideally, the contract itself would have been clearer about the conditions, if any, under which the deposit should be returned.[10] A shared understanding between the parties about their respective rights and responsibilities might have prevented both actual and perceived injury. The point of the contract, arguably, was to achieve just such a mutual understanding up front. Contract failed to deliver it.

Contract looks at first blush like an especially promising legal instrument for promoting agreement about what two parties owe each other and for avoiding disputes after the fact. While a number of its features facilitate this function, the most important is assent to contract—or what I will refer to here going forward as "consent," consistent with ordinary usage.[11] Parties in contract have intentionally communicated a willingness to be bound by certain terms; we could expect their consent to preempt disagreement in most cases.

In most cases, it does. But ambiguity abounds. Even when contract law delivers a clear answer to the question of contract validity, parties to a contract bring with

---

1. Martorella v. Rapp, No. 20 MISC 000153 (MDV), 2020 WL 2844693, at *3 (Mass. Land Ct. June 1, 2020).
2. *Id.* at *3–4.
3. *Id.* at *4–5.
4. *Id.* at *5.
5. *Id.* at *6.
6. *Id.*
7. *Id.* at *4.
8. *Id.* at *10.
9. *Id.* at *6–7.
10. I refer to clarity as a general ideal, setting aside its obvious costs, including the transaction costs of specification.
11. *See* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1757 (2014).

them richer accounts of consent than the law of contract contemplates. Our everyday understanding of contract is rife with ambiguities that muddy the work that consent has done in a particular transaction.

We might be tempted to trace ambiguity in contract to the limits of language, but disputes between parties are not limited to disputes about the meaning of what was said.[12] Many disagreements pertain to allegedly implied terms or conditions that no one disputes were not expressly captured in oral or written language.[13] The parties nevertheless dispute what was implicit in their understandings, or one might say, the scope of their assent—whether they promised to perform an obligation irrespective of a contingency (such as the illness of a family member), or whether the other party's entitlement depended on some state of the world materializing.[14] Consent to contract, I will argue, is particularly poor at foreclosing disputes of that kind. In fact, moral ambiguity in the concept of consent might make that kind of disagreement more likely.

While my focus is on consent in contract, the discussion here will illuminate the dynamics of consent present in other contexts too. For example, if consent is fraught in the relatively impersonal context of commercial exchange with the benefit of clear legal rules, we can expect consent to be still more contested in the context of access to the body, as in health care and sex.[15]

I will first explore in Part I how legal norms operate to manage, if not mitigate, disagreement about what we owe each other in law, which informs how we understand what we owe each other more broadly in some contexts. Disagreement about breach of contract and contract-based harm are further allayed by several features of contract law in particular, such as objectivity, strict liability and, most

12. We know that most contract disputes are about interpretation, but this is a broad concept that includes analysis of both express and implied terms. *See* Benjamin E. Hermalin et al., *Contract Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 3, 68 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("Probably the most common source of contractual disputes is differences in interpretation . . . ."); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928, 928 n.3 (2010) ("[C]ontract interpretation remains the largest single source of contract litigation between business firms.").

13. *See, e.g.*, *Martorella*, 2020 WL 2844693, at *3. Most cases involving implied terms, implied conditions, impracticability or frustration of purpose turn on what went unsaid rather than the meaning of express language. *See, e.g.*, Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566 (N.Y. 1978) (concluding there was no implied covenant against assignability of lease); Seman v. First State Bank of Eden Prairie, 394 N.W.2d 557 (Minn. Ct. App. 1986) (agreement by bank not to cash checks was implicitly conditioned on checks being lost).

14. *See, e.g.*, *Martorella*, 2020 WL 2844693, at *1.

15. *See* Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 340–41 (2013) (discussing fraught use of consent in relation to sex).

importantly, voluntariness.[16] Voluntariness turns on the fact that each party consents to the terms of the agreement.[17] On an initial analysis, consent appears to preempt ex post disagreement about contractual obligation.

And yet—contract disputes are common. The remainder of the article helps to explain why this is so. In Part II, I explore four ambiguities in the concept of consent. First, in different contexts, consent may or may not reveal that the consenting party endorses the terms or activity that they allow.[18] Second, consent must sometimes but not always meet some "quality" threshold based on the degree of information, understanding and deliberation behind consent.[19] Third, the "life" of consent is sometimes short, such that it expires almost immediately, while at other times it is intended to survive future uncertainties.[20] Finally, the force of consent is inconsistent; although it is intended to permit what would otherwise be impermissible,[21] consent does not always have the power to inoculate someone from responsibility for the harm she inflicts. These ambiguities are conceptual but, in each case, one understanding of the concept operates on a fuller set of facts than the other.

In the final Part, I argue that, instead of committing analytically to one conception of consent, i.e., one set of answers to the ambiguities identified in Part II, we tend to operate on a hybrid conception that relies on the facts available to us. Psychologists have shown that we tend to rely on the facts that are most readily available to us when we make snap probabilistic judgments.[22] I contend that we do something similar even in the context of moral reasoning. While deliberation may allow us to avoid privileging salient facts, where a moral concept is ambiguous, we tend to rely on an understanding of it that we are in a position to actually use.[23]

---

16. *See* Nick Sage, *Reconciling Contract Law's Objective and Subjective Standards*, MOD. L. REV., 2023, at 1; *see generally* George M. Cohen, *The Fault That Lies Within Our Contract Law*, 107 MICH. L. REV. 1445 (2009) (discussing theories of strict liability underlying American contract law); *see generally* Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433 (2019) (discussing competing accounts of voluntariness in contract).

17. *See generally* Bagchi, *supra* note 16.

18. Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RSRV. L. REV. 57, 75–78 (2012).

19. *See generally* Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165 (2017) (discussing qualitative requirements of consent in contract law).

20. *See* Neil C. Manson, *Permissive Consent: A Robust Reason-Changing Account*, 173 PHIL. STUD. 3317, 3320, 3329 (2016) (discussing the "normative scope" of acts of consent).

21. *See generally* NEIL C. MANSON & ONORA O'NEILL, RETHINKING INFORMED CONSENT IN BIOETHICS 1 (2007) (discussing consent makes something permissible that otherwise would not be).

22. This is called the "availability heuristic." *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207, 208–09 (1973).

23. *See id.* at 208.

Consent is one such morally ambiguous concept. Some understandings of it turn on a more comprehensive set of facts than others, but those comprehensive facts are usually accessible only to the party that granted consent.[24] While in contract, each party has consented to terms. In a dispute, the obligations of one of those parties—and therefore, the nature and scope of that party's consent—is usually at issue. I will refer to the party whose consent is contested as the "grantor" of consent and the counterparty as the "receiver" of her consent. The epistemic differences between the grantor and receiver of consent drive a systematic wedge between first-person and second-person experiences of consent. That gap can cause parties to react incongruously to harms that flow from the course of the transaction.

Contract law takes a side in disagreements about consent, and it is one that the parties can predict at the outset. But because legal consent purports to track a moral concept with a life of its own, the law of contract cannot displace the divergent understandings of consent that people bring to their encounters with others. While consent seems uniquely capable of delivering accord between separate minds and agendas, it also introduces a distinctive source of disagreement. If contract law is to track the moral attitudes of its users, it must accommodate moral ambiguity surrounding consent by adjusting both rules and their application to facts that people tend to regard as morally significant.

I. DISAGREEMENT ABOUT OBLIGATION

People disagree about what they owe each other. For example, when someone breaks a promise to help a friend in order to meet a work obligation, they may disagree about the conditionality of the promise, or the relative priority of work obligations over obligations based on some combination of friendship and promise. They might also disagree about remedial rights and obligations. For example, even if they agree that it was wrong to break the promise, they might disagree about whether the (mildly) betrayed friend has any right of complaint, let alone any entitlement to a compensatory lunch or promise of future assistance. These are disagreements that they might have had before the promise was ever broken. The disagreements could have surfaced in gossip about other people. Thus, we can identify one source of interpersonal conflict: principled disagreement about underlying obligations.

Disagreement tends to be more pointed when one of the parties to disagreement has suffered a harm. The intensity of disagreement might be attributed to simply

24. *See id.*; *see generally* Alice M. Tybout et al., *Information Accessibility as a Moderator of Judgements: The Role of Content Versus Retrieval Ease*, 32 J. CONSUMER RSCH. 76 (2005).

caring more one way or the other about the right answer to the evaluative question. But disagreement may also be more intense for another reason.

When we debate what a third party owed another third party, we usually start with the same facts. Even if we operate under uncertainty, we can agree to stipulate that facts are one way rather than another for purposes of our argument. Our argument, after all, often has no practical import. We are thrashing out moral principles. If, however, we are arguing about a situation with which we are personally connected (instead of a situation we have read about), even if we were not participants, we cannot agree to operate on hypothetical facts because judgments about what is owed will give us reasons to proceed in one way or another with respect to those who were party to the harm. But we are also likely to hold different beliefs about the people involved in the accident that speak to the plausibility of their intentions, or even what we think happened precisely. Our connection to the facts gives us access to facts, but distinct sets of facts, and those facts drive our judgment about the situation farther apart.

For this reason, we can expect the magnitude of disagreement to be greater between harm-doer and harm-receiver than between third-party observers. The harm-doer will have one understanding of their own intentions and will recall facts that are relevant to their choices that may not even be known to the harm-receiver, at least at the time their initially adopts their reactive attitude to the harm.[25] Similarly, the harm-receiver will have access to facts regarding, for example, the scope of the harm that they suffered, that may not be accessible to the harm-doer. Because the parties are operating on distinct factual records, we can expect them to disagree even more than people who disagree only on the abstract moral principles at stake.

How does law operate on the frequency and magnitude of our disagreements about what we owe each other? One might be tempted to say that reactions to legal obligations do not matter; only the judgment of the state matters as to the respective rights and obligations of parties to a transaction. But disagreement about underlying obligations as well as the underlying facts that drive interpersonal conflict are problematic for legal institutions.

Private law, especially in common law systems, depends on prevailing understandings of what we owe each other to set our bilateral legal obligations to each other.[26] The idea is not that private law mimics private morality. But while legal

25. *See* P.F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS 13–15 (1974) (defining the concept of a reactive attitude, or the second-person emotional reaction of an agent to wrong-doing).

26. *See* Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 4 (1999) ("Custom's role in tort law is pervasive."); Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451, 451 (2006)

obligations do not track moral obligations, and are generally a far narrower set, they do track what we collectively think are appropriate legal obligations. That is, with respect to any given harm, we have not only a view about what is owed, if anything, but also a view about whether the debt should be legally enforceable. While judicial opinions are not based on any referendum on our views, they tend to reflect popular conceptions of what is reasonable.[27] This is sometimes because prevailing standards are built into legal norms.[28] At other times, it is because judges unselfconsciously incorporate their own understandings of what is reasonable and their conceptions mirror dominant conceptions.[29] Perhaps over time, judges are also held in check from departing from popular morality too rapidly or severely given institutional processes of appointment and accountability.[30] In any event, judges rarely hold individuals responsible for what they have done to others under circumstances under which most people would reject the prospect of legal liability.[31]

Disagreement about what legal obligations should look like tends to undermine the legitimacy of law.[32] Even if authority is conceived in binary terms, its legitimacy is scalar and may vary depending on whether those subject to it regard legal answers to questions of liability as consistent with their own beliefs about what legal liability should look like.[33] In the face of deep disagreement, there is no way for the law to

("Article 2 of the U.C.C. directed courts to look to business norms as a primary means of interpreting contracts.").

27. *See* Mark Kelman, *Intuitions*, 65 STAN. L. REV. 1291, 1292 (2013) (explaining why people tend to assume that "all else equal, legal rules should track commonplace moral beliefs"); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1405 (2005) ("When a particular criminal rule conflicts with the moral intuitions of the governed community, the power of the criminal law as a whole to induce compliance is in jeopardy because it is no longer viewed as a trustworthy source of information regarding which actions are moral and which are not.").

28. *See* Kelman, *supra* note 27, at 1292–93; Nadler, *supra* note 27, at 1434–35.

29. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167–77 (Yale Univ. Press 13th prtg. 1946) (1921).

30. *See* Neal Devins, *The D'Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1347–50 (2007) (arguing that appointment and confirmation process produces a court that tracks the median voter); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 739–42 (2005) (arguing courts are responsive to majority views); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 498–500 (2005) (showing majoritarian control of federal judges).

31. *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1343–45 (2017) (discussing how judges import social norms into tort liability standards); Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMPAR. L. 609, 631 (2017) (explaining how custom avoids the problem of courts imposing legal standards without notice).

32. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 264 (1980) ("[M]oral duties not only provide a basis for judicial justification; they also provide a minimal standard for legal legitimacy.").

33. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) ("A criminal law with liability and punishment rules that conflict with a community's shared

mirror popular conceptions of "right" legal liability standards. For example, if half the population thinks it is outrageous that gun manufacturers are not held accountable for gun violence by tort law, while the other half finds the idea outrageous, on the margin, tort law suffers a legitimacy blow.[34] Similarly, if citizens disagree deeply about what kinds of comments and conduct constitute sexual harassment, a significant portion of them will look askance upon the prevailing legal regime, no matter what it is.[35]

Moreover, because legal obligations are not self-enforcing, disagreement about the substance of legal obligations complicates their enforcement.[36] Most of the time, parties "settle" any claims between them without even the specter of litigation.[37] If people disagree fundamentally, however, it is far more likely they will end up in court to resolve their differences.[38] While the judicial system is set up to handle those disputes, it also presupposes that most claims do not escalate into disputes that will require state involvement.[39]

Finally, private law is animated at least in part by the aim of reconciling parties' attitudes to a given instance of harm.[40] As civil recourse theory emphasizes,

---

intuitions of justice will undermine its moral credibility."); *see also* Richard B. Katskee, *Science, Intersubjective Validity, and Judicial Legitimacy*, 73 BROOK. L. REV. 857, 862 (2008).

34. *See* Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359, 359 (2014) ("Americans disagree persistently on gun policy, and the disagreement tends to follow geographic and cultural lines.").

35. *Cf.* Sarah Pennington, *"Do You Think Sexual Assault and Harassment Are a Big Problem in Society?": How #MeToo May Impact Juror Decision-Making in Sexual Assault and Harassment Cases*, 59 U. LOUISVILLE L. REV. 89, 106 (2020) (describing increased polarization on issues relating to sexual harassment).

36. *See* David Dyzenhaus, *Process and Substance as Aspects of the Public Law Form*, 74 CAMBRIDGE L.J. 284, 289 (2015) ("'[W]hat ultimately divides the formal and substantive conceptions of the rule of law is disagreement about the way in which we identify legal norms.'") (quoting Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUB. L. 467, 487 (1997)).

37. *See* Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1774 (1997) ("[T]he Age of Litigation is in the process of being succeeded by the Age of Mediation, or at least the Age of Settlement."); *see also* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 12 (2001); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994).

38. *See* Galanter & Cahill, *supra* note 37, at 1376 (explaining that integrative and problem-solving bargaining styles are less useful when the parties' interests are "inherently opposed").

39. *See* John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 196 (2018) ("[P]arties ultimately settle in all but an insubstantial percentage of cases, leaving only an occasional civil matter for trial.").

40. For a detailed account of how private law manages inconsistent normative reactions to harm, *see* Aditi Bagchi, *Private Law and Public Discourse*, 66 ARIZ. L. REV. (forthcoming 2023) (describing how litigation manages "reactive discord").

interpersonal conflict about rights and obligations can result in violence.[41] Short of violence, it can leave parties embittered and divided in ways that undermine social cooperation going forward. By offering a purportedly definitive and consistent account of what we owe each other under the law, adjudication narrows the prospects for conflict and thereby promotes the conditions of its own legitimacy and efficacy.[42]

Case law and statutes governing private liability both reduce conflict by substantially reducing one of its two drivers: disagreement about the content of legal obligations.[43] Disagreements with respect to moral obligations are often the product of underlying disagreement about both principles and facts.[44] However, factual disagreements (including soft facts pertaining to intention and character) disproportionately drive disagreement about legal obligations.[45] People are less likely to disagree about whether they are legally guilty or responsible than they are about whether they are morally culpable or appropriately remorseful.[46] It might be that settling the matter of legally enforceable obligation over time puts benign pressure on moral disagreement.[47] But at the least, it boosts the legitimacy of the institution of private law; renders practical its enforcement; and helps it to maintain peace, understood either as nonviolence or justice.[48]

In principle, we might expect the reconciling impulse of law to be especially strong with respect to contract. That is, we might think that breaching parties and

---

41. Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 529 (2011) ("The private law in effect domesticates and civilizes retaliation by replacing private warfare with civil recourse through the courts. It thus facilitates the social cooperation made possible by the ancient threats of retaliation, while avoiding the danger of escalation and violence that such private violence presented.")

42. *See id.* at 550; *see also* Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 2 (1993).

43. *See* Keating, *supra* note 42, at 2.

44. *See id.* at 5.

45. *See* Donald H. Regan, *Law's Halo*, *in* PHILOSOPHY AND LAW 15, 17 (Jules Coleman & Ellen Frankel Paul eds., 1987).

46. *See* Keating, *supra* note 42, at 3 (stating that it is a premise of liberal democratic thought that "legal discourse . . . must be sheltered from the full force of moral conflict and disagreement").

47. *See* Regan, *supra* note 45, at 15 (describing "strong inclination to invest" legal norms with moral significance); *see also* Kenworthey Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 253–58 (Eyal Zamir & Doron Teichman eds., 2014); Bert I. Huang, *Law's Halo and the Moral Machine*, 119 COLUM. L. REV. 1811, 1812 (2019). The tendency for people to bring their moral beliefs about obligation in alignment with legal norms has been explained by reference to the guidance function of law. The concept of a "conduct rule," for example, implies that legal rules are intended to guide individuals in their everyday conduct. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 632 (1984) (discussing conduct rules).

48. *See* Ward Farnsworth, *The Economic Loss Rule*, 50 VAL. U. L. REV. 545, 553 (2016).

nonbreaching parties, or even winners and losers from a sharp deal, are more likely to react with correlative attitudes in contract than in other sites of harm, such as those dealt with in tort. Several features of contract might make us optimistic.

First, contractual obligations are in large part set by parties themselves.[49] While they might misunderstand each other, most breaches do not concern the points of potential misunderstanding. In fact, many key commitments by parties are manifest in express terms; parties were on notice of them at the outset of their relationship. In more sophisticated written agreements, parties might further specify second-order principles of interpretation (as in a merger clause) or remedial obligations (as in a liquidated damages clause). Even if those are not binding on courts called upon to enforce those agreements, they might help manage disagreements about what is relevant to deciphering the parties' agreement after the fact. Contractual relationships thus benefit from a notable mark of clarity relative to relationships in which all obligations are set by moral principles about which the parties may disagree, or legal principles that the parties many not know about.[50]

Second, because obligations in contract are controlled by the objective meaning of the parties' communications, many kinds of facts that are asymmetrically known to the parties become irrelevant to setting contractual rights and responsibilities.[51] The only facts that matter to setting contractual obligations are the facts that are actually known to both parties, or of which they were on reasonable notice.[52] Of course, they may dispute what was said or done. But an infinite range of facts that speak to their subjective understandings is taken off the table as foundation for disagreement.[53]

Contractual liability is also subject to strict liability.[54] This feature too makes irrelevant one of the major sources of factual disagreement. Parties can disagree,

---

49. The now commonplace idea that contracts are incomplete and require default rules to fill in gaps implies that the parties themselves have set the material terms. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 595 (2003) (stating agreements that do not specify "material terms . . . are not legally binding").

50. *See* Farnsworth, *supra* note 48, at 553 ("Parties wrangle over integration clauses to make clear that their obligations are the ones stated in the contract and nothing else . . . .").

51. *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 778–79 (Mo. Ct. App. 1907).

52. *See* Bourland v. Choctaw, O. & G. Ry. Co., 90 S.W. 483, 484 (Tex. 1906) ("[T]he rights and liabilities of the parties are fixed by the contract and the circumstances known to them when it is made, and cannot be increased by notice of other facts subsequently given.").

53. *See id.*

54. *See* Eric A. Posner, *Fault in Contract Law*, 107 MICH. L. REV. 1431, 1431 (2009); Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381, 1381–82 (2009); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1342–43 (2009).

for example, on how probable each of them regarded their own performance, or how hard they tried to perform. They can disagree about the answers to those questions and still agree on whether one party's conduct qualifies as breach. Strict liability narrows the scope of relevant facts.[55] Just as the possibility of controversy over the substance of obligations is not removed by the principle of objectivity, the possibility of controversy over the fact of breach is not removed by the principle of strict liability.[56] Still, as a relative matter, these features reduce the likelihood of ex post disagreement.

Finally, and one would expect, most important, we might think parties to contract are not positioned to dispute the substantive justice of the obligations they assumed in contract because those obligations were taken on voluntarily.[57] We observed earlier that one of the challenges that sustained or sharp disagreement poses to the legitimacy of the law is that it reinforces misalignment between the obligations recognized by law and the law that people believe are properly legally enforced.[58] If parties have voluntarily assumed the obligations they are alleged to have breached in contract, we might expect closer alignment among the judgments of parties and the state.[59] The next part discusses why the notion of voluntariness can have a contrary effect. While disagreement about contract may not be worse than disagreements about other contexts in which one individual suffers a setback at the hands of another, the phenomenon of consent brings its own problems.

II. MORAL AMBIGUITY IN THE CONCEPT OF CONSENT

Consent is a complex normative phenomenon that does work in a variety of contexts, in and outside the law.[60] The use of the concept in the context of contract and in other legal contexts, as well as in our lives outside the law, subjects it to the push and pull of competing analytic and functional demands.[61] The result is that we do not have a single, consistent, conception of consent.[62] This conceptual open-endedness allows that, even with respect to the same interaction, parties may differ

55. *See* Scott, *supra* note 54, at 1396.

56. *See* Posner, *supra* note 54, at 1431; Scott, *supra* note 54, at 1381-82; Ben-Shahar & Porat, *supra* note 54, at 1342-43.

57. *See* Bagchi, *supra* note 16, at 433 (discussing the concept of voluntariness in contract).

58. *See* Kelman, *supra* note 27, and accompanying text.

59. *See id.*

60. *See* Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1438 (2009).

61. *See id.*

62. *See id.*

in the conception they apply.[63] Each of them will be influenced by how the concept is used more broadly but often they will not use the same version of it.[64]

Contract law does not formally require consent as a requirement of contract, nor is consent sufficient to establish a legally binding agreement.[65] While Randy Barnett has offered a compelling and influential consent-based theory of contract,[66] most contract scholars in the United States tend to talk about contract in the language of promise instead.[67] Regardless of which concept better reveals the deep normative structure of contractual obligation, consent understood simply as assent is an essential and uncontroversial element of contract.[68] I use the language of consent here because it tracks ordinary usage, and the blending of the concept across different contexts is a result, in part, of the use of the same term across those contexts.

Contract as assent in contract is captured in the process of offer and agreement. In order to be bound by contract, one must either have made an offer evincing a fixed intention to contract on specified terms, or one must have accepted an offer in such a manner as to communicate a similar fixed intention.[69] Offer and acceptance together ensure that contracts are "voluntary" in ordinary parlance.[70] They are taken to mean that the parties have granted some set of entitlements to the other

---

63. *See id.*

64. *See id.*

65. *Id.* at 1444 ("[T]he parties' intent to contract does not suffice under the common law to create a contract."); *see also, e.g.*, *In re* Greene, 45 F.2d 428, 430 (S.D.N.Y. 1930) (refusing to enforce agreement notwithstanding express statements evincing desire to be legally bound by parties).

66. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 269 (1986).

67. *See* Erik Encarnacion, *Contract as Commodified Promise*, 71 VAND. L. REV. 61, 62 (2018) (promise theory dominant in the United States); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 58 (2013) ("Promise-based theory is still the basis of much of contract philosophy . . . ."); STEPHEN A. SMITH, CONTRACT THEORY 44 (2004) (describing promissory theories as an "orthodox" explanation of the analytical question of what contracts consist of).

68. *See* Barnett, *supra* note 66, at 299 n.121. Another concept of consent is more akin to permission or waiver. While consent as assent is present in consent as waiver, consent as waiver is more encompassing than consent as assent. For example, if I allow you to park in my garage, I am waiving my right to exclude you from my property; I am also assenting to, or going willingly along with the proposition that you may park there. But if I consent to your summary of events, I am not, necessarily, waiving any rights with respect to that account, I may have none to begin with; I merely assent rather than object, contest or reject.

69. Saúl Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 701–02 (1987) ("The consent of the parties to a contract may be established through the process of offer and acceptance whereby a party makes a proposition to the other—the offer—and the other assents to the proposition—the acceptance."); Leonhard, *supra* note 18, at 70 ("The consent concept is reflected in contract law doctrines governing contract formation . . . .").

70. Leonhard, *supra* note 18, at 72.

party; the effect is also to allow judicial enforcement of the rights and obligations resulting from agreement.[71] Parties may in the process also make promises and reach agreement—but, minimally, they have consented to the terms of the agreement to which they are now bound.[72] The idea of a normative power is that a party alter their normative position by communicating an intent to do so.[73] Consent understood as mere assent may be one constitutive element of the exercise of any normative power resulting in voluntary obligation. Without consent of this kind, any enforced obligation is not properly regarded as voluntary.

In the remainder of this Part, I will show that consent has multiple and contested meanings, more than one of which can be plausibly applied in the contractual context.[74] I will then work through a series of hypothetical contracts to illustrate how divergent accounts of consent may drive disagreement about what contracting parties owe each other. In the following Part, I explain why parties to contract are likely to consistently apply competing conceptions.

A. Conceptual Ambiguity

The most important ambiguities regarding consent fall around the significance of three kinds of facts: the initial choice set, the degree of understanding or scope of information, continuity of circumstances, and actual consequences to the authorizing agent. I will refer to these as questions about the degree to which consent is revealing, its quality, relevance, and force, respectively. Because consent turns on one or more of these questions in some contexts, the concept is permeable by a range of facts. Contract law itself assigns some significance to each of these considerations as well, so there is no bright line insulating the legal concept from other legal and moral counterparts.

---

71. *E.g.*, Robertson v. United States, 343 U.S. 711, 713 (1952) ("The acceptance . . . of the offer tendered . . . creates an enforceable contract.").

72. Fire Ins. Ass'n v. Wickham, 141 U.S. 564, 579 (1891) ("To constitute a valid agreement there must be a meeting of [the] minds upon every feature and element of such agreement . . . .").

73. *See* Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 PROC. ARISTOTELIAN SOC'Y 59, 79, 94 (1972).

74. *See* James Konow, *Coercion and Consent*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 49, 50 (2014) ("[C]onsent is constructed out of multiple underlying factors and varies in fine degrees" and depends on the application of independent moral principles); *see also* Monica R. Cowart, *Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes*, 23 LAW & PHIL. 495, 498 (2004) (defending intentionalist over conventionalist views of consent and discussing diverse conceptions).

1. Revealment

Ordinarily, consent is credited as meaningful on the theory that it reveals an agent's preferences. For example, when an agent consents to an exchange, we think it evidences their belief that they will be better off under the terms of the proposed exchange than without it.[75] Because agents are usually regarded as the best stewards of their own well-being, and the most informed as to their own preferences, consent even gives us reason to believe that the agent really will be better off under the terms that they accept.[76] However, this is not always true, for many reasons. We may consent not because we think we will be better off but because we want to get along, or feel a misplaced obligation to consent, or a desire to please.[77] (We may also be ill-informed or make errors of judgment; these will be discussed further below). Without accessing the psychology behind consent, which varies by individual, we cannot know that consent reliably reveals preference at all.

Separate from the psychological assumptions in gleaning preference from consent, we often take consent to be revealing in a further sense that is not justified. In some contexts, consent as assent amounts to endorsement—or endorsement is what we are looking for. We have seen this shift in the context of sexual consent; individuals should not be regarded as consenting (morally, if not legally) unless it is reasonable to conclude that they endorse or want the activity to which they consent.[78] This might be true by degree in most cases outside of exchange. For example, if I purport to consent to your use of my car, but it is evident that I do not want you to use it, absent overriding considerations, you ought at least to hesitate to use it. My purported consent should be regarded as ineffective only if you have specific reason to believe that I do not want you to use it. For example, if my best friend has threatened to slash your tires if you do not make the car available, I should retreat rather than take advantage of your coerced consent.[79]

---

75. *See* Oren Bar-Gill & Lucian Arye Bebchuk, *Consent and Exchange*, 39 J. LEGAL STUD. 375, 377 (2010) ("Mutual consent, secured through bargaining, ensures that the exchange takes place if and only if it is ex post efficient.").

76. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 41 (14th ed. 1992) ("[Efficient exchanges] are made through voluntary exchange of goods for money at market prices . . . .").

77. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 391 (1985) (arguing that even express consent may not "strengthen our sense of autonomy or increase our subjective well-being" given the reality of human personalities and motivations to consent).

78. *Cf.* Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257, 257 (2016) (observing shift in consent standard to affirmative desire rather than mere willingness and arguing against a more stringent standard of affirmative consent in the sexual context).

79. *See* Joseph Millum, *Consent Under Pressure: The Puzzle of Third Party Coercion*, 17 ETHICAL THEORY & MORAL PRAC. 113, 114 (2014) ("[W]hen presented with a token of consent from someone whom she thinks is experiencing an illegitimate controlling threat, the recipient may act on that token

In the context of exchange, the analysis is different. An agent might consent to your use of her car because she has no alternative; she might need the money you have offered her for your use. When consent is offered in exchange for some reciprocal benefit, consent may not amount to endorsement; it may merely reflect relative preferences within a highly constrained choice set. The choice set does not undermine conclusions we can draw about an agent's relative preferences within it. However, the choice set speaks to whether the agent's choice tells us anything about whether they are happy or even content with the "choice" they have made. It is plausible that in some contexts, we are not interested in an agent's endorsement, or enthusiasm, for their choice, but in others, it is reasonable to ask what the choice set is before taking consent as meaningful.[80] Certainly for the agent, the choice set makes all the difference between whether their consent is experienced as an exercise of agency or the social mechanism by which misfortunate generates obligation.[81]

2. Quality

We think of consent as lacking quality when it is not sufficiently informed by relevant information.[82] Some scholars go further and would require some threshold level of understanding, either of the nature of what the agents consent to, or the potential consequences of their consent.[83] Still others would go further and hold that consent should reflect meaningful deliberation.[84]

---

if and only if doing so represents a reasonable joint decision for her and the victim of coercion. The appropriate action for someone faced with third party coercion therefore depends on the other options open to her and those open to the victim of coercion.").

80. *Cf.* Steve Clarke, *Informed Consent in Medicine in Comparison with Consent in Other Areas of Human Activity*, 39 S. J. PHIL. 169 (2001) (distinguishing authenticity and freedom models of consent).

81. *Cf.* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008) (contrasting duty-imposing and power-conferring pictures of contract).

82. *See* STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 77 (2003) ("The reason why information matters is simply that in order for A to consent to X, A needs to know what X is and what the likely consequences of X are.").

83. *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) ("[C]onsent must be informed or knowledgeable in some meaningful sense if we are to accord it legal or moral significance."); Irene Pollach, *A Typology of Communicative Strategies in Online Privacy Policies: Ethics, Power and Informed Consent*, 62 J. BUS. ETHICS 221, 228 (2005) (stating poor estimation of the frequency or probability of various events can compromise the quality of consent); John Kleinig, *The Ethics of Consent*, *in* NEW ESSAYS IN ETHICS AND PUBLIC POLICY 91, 99 (Kai Nielsen & Steven C. Patten eds., 1982) (stating consent is an act that X must perform "voluntarily, knowingly and intentionally").

84. *See* Stephen Mumford & Rani Lill Anjum, *Powers, Non-Consent and Freedom*, 91 PHIL. & PHENOMENOLOGICAL RSCH. 136, 142-48 (2015) (arguing that even consent consistent with a desire may not be effective if the desire does not reflect the agent's higher powers of self-reflection).

Each of these demands on consent is appropriate in some contexts and always relevant at the extremes. While a person can formally consent without having any idea what they are consenting to (as in a "blank check"), we would rarely take their consent to be meaningful. Even if they consented to having their partner order them dinner, it would not be meaningful if they did not have any sense that there are live animals on the menu. Similarly, a patient that allows that a doctor may treat them as they see fit in light of their medical expertise would not be regarded as having consented to having their heart and lungs removed because the doctor thinks mechanical pumping of blood and oxygen is their best bet.

At lesser extremes, the significance of information varies considerably and the quality of consent varies by degree.[85] I cannot meaningfully consent to abide by a person's medical judgment if the person I regard as a physician is only an actor pretending to be a physician. But I can probably consent to have my recent bank transactions reported to me by someone I believe to be the same service representative that assisted me in the past, when in fact all customer service agents are assigned one of three names for purposes of answering service requests. Then there are intermediate cases, such as the degree of information and misrepresentation that is required or permitted, respectively, to allow for consent to sex.

Even where an agent is reasonably well-informed about the choice they are making, their consent may be compromised if it is too careless.[86] The key is that the level of care exercised must be proportionate to the nature of the activity to which they consent. Giving consent to your neighbor to borrow the rake you have left in your backyard need not be the product of great deliberation. Consent to a high-stakes activity that might result in loss of one's home should reflect more thought. Is the "ought" relevant to the receiver of consent, as well as the giver? That is, even if consent should be thoughtful, does it undermine its efficacy when granted thoughtlessly? Given the ubiquity of careless or error-prone deliberation, imposing high quality standards narrows the reach of consent considerably, perhaps too

85. *See* Bradford H. Gray, *Complexities of Informed Consent*, 437 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 41 (1978) ("[T]he conception of informed consent as an ideal explicitly recognizes that being informed or being free of pressure is always a matter of degree. To see informed consent as an ideal is to recognize it as something that varies along a continuum of quality, not as an attribute that is either present or absent . . . [This conception] differs distinctly from the binary approach that the courts must take.").

86. H.L.A. HART, LAW, LIBERTY AND MORALITY 33 (Stan. Univ. Press 1979) (justifying paternalistic restrictions, e.g., on sales of drugs) ("Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in court."). These observations on what a normal human being is like apply both to a range of situations with varying stakes, *id.*

much.[87] In some contexts, we might draw a line between understanding the content of consent and understanding its consequences.[88] But this is not always compelling. For example, a patient who understands that their liver will be removed does not meaningfully consent if they have not been informed of and properly deliberated about the potential effects of removing their liver.[89]

Information, understanding and deliberation all speak to the quality of consent.[90] We appropriately vary the standard of quality we impose to treat consent as operative but we do not have a clear rule to dictate what standard should apply in any given context.[91] Instead, we are left to extrapolate from social and legal norms a working rule with respect to each instance of consent that we encounter.[92] It is not surprising that we do not apply the same standard consistently among ourselves.

3. Relevance

Most of the time, consent is short-lived. Consent to sex expires almost immediately; it does not make permissible conduct that occurs even minutes later in the face of contradictory signals.[93] Similarly, if I consent to you borrowing my bicycle, your license expires as soon as the situation in which the consent was granted has passed; you cannot borrow my bicycle at any time. Expired consent is irrelevant to moral rights. Other times, consent is intended to last, and in fact, might be intended to survive future contingencies.[94] If I promise to care for you "in sickness and in health," the whole idea is that my promise does not depend on what future materializes.

---

87. *See* Alasdair Maclean, *Now You See It, Now You Don't: Consent and the Legal Protection of Autonomy*, 17 J. APPLIED PHIL. 277, 281 (2000) (explaining most people do not meet high standards of rationality, so legal consent has to be watered down); *see also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 137–38 (Farrar, Straus & Giroux 2011) (discussing a variety of cognitive errors that we commonly make).

88. *See* Tom Walker, *Informed Consent and the Requirement to Ensure Understanding*, 29 J. APPLIED PHIL. 50, 53–54 (2012) (explaining that, in an example concerning consent to a surgical procedure, consent that requires understanding of what will happen that would otherwise be impermissible but does not require understanding that they will benefit).

89. *Id.* at 52.

90. *See generally id.*

91. *See id.* at 55.

92. *See id.* at 59.

93. Susan Ehrlich, *The Discursive Reconstruction of Sexual Consent*, 9 DISCOURSE & SOC'Y 149, 153–55 (1998) (describing sexual aggression in which aggressor understood earlier tentative consent as effectively binding).

94. *Cf.* John K. Davis, *Precedent Autonomy and Subsequent Consent*, 7 ETHICAL THEORY & MORAL PRAC. 267, 287 (2004).

Ideally, we would be able to rely on the communicated intentions of the consent-giver to learn what the life (or scope) of her consent is.[95] But consent-givers do not always specify the life of their consent, nor does context always deliver a clear answer.[96] We are left, then, with the normative task of asking how long we would expect or want such consent to last. If the initial grant of consent was almost whimsical and appeared a reaction to the very particular circumstances in which it was given, we have little reason for thinking it will apply outside of those circumstances.[97] On the other hand, treating consent as inherently fleeting potentially disempowers the consent-giver, who now must go out of their way to avoid the default of short expiration even if it is valuable to them to shape their future by way of the totality of admittedly contingent decisions.[98] We might be tempted to deny that consent can ever survive changes of circumstance that the consent-giver could not have contemplated, but then again, we would deny the consenting party the power of governing their future notwithstanding its uncertainties.[99]

4. Force

The final ambiguity we elaborate here concerns the force of the normative power in contract. The question of force encompasses two distinct questions. First, how powerful is consent in inoculating its recipient against charges of moral or legal wrongdoing against the consenting party? Some scholars have argued that, especially with respect to physical or serious harm, consent has no moral effect at all; the receiver of consent is still obligated to protect the interests of the consenting party.[100]

---

95. *See* Neil C. Manson, *Permissive Consent: A Robust Reason-Changing Account*, 173 PHIL. STUD. 3317, 3320 (2016) ("[A]cts of consent have a *normative scope*.").

96. *See id.* at 3317.

97. *See* Jason Hanna, *Consent and the Problem of Framing Effects*, 14 ETHICAL THEORY & MORAL PRAC. 517, 517 (2011) (doubting the normative effect of consent given how sensitive it is to framing effects).

98. *Cf.* Davis, *supra* note 94, at 267 ("[S]ometimes we respect a person's autonomy by respecting a preference she no longer has. This happens when her preference concerns her future, and when that future arrives, we respect that preference even though she has ceased to have it by then. This is respecting her 'precedent autonomy.'").

99. *Cf.* Sheldon Leader, *Statehood, Power, and the New Face of Consent*, 23 IND. J. GLOB. LEGAL STUD. 127, 129 (2016) (doubting that an employee can effectively consent to employment terms subject to significant change in the future).

100. *See, e.g.*, John Kleinig, *Consent as a Defence in Criminal Law*, 65 ARCHIVES FOR PHIL. L. & SOC. PHIL. 329, 339 (1979) ("[M]ost of us . . . would feel that even where harms are invited (a matter whose determination raises considerable problems), we at least owe it to the humanity in the other person to do something for them."); Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 98 (2009) (rational autonomy may render consent inert where personal autonomy might cut in favor of applying it); *see also* Fred M. Frohock, *Liberal Maps of Consent*, 22 POLITY 231, 235 (1989) (discussing limitations of liberal treatment of consent).

The second question concerns the force of implicit consent, or consent between the lines of express consent. Is consent that a reasonable person can infer just as binding as consent that was intended and expressly granted?[101] Many contract rules, after all, are merely default rules to which we suppose the parties would have consented had they anticipated them or the need for a specified contract rule.[102] While contract law clearly takes an objective approach and relies practically on reasonable interpretation,[103] outside of the law there is doubt that hypothetical force is effective.[104]

To both questions, we might be tempted to construe consent broadly in order to grant agents more power to control their normative situation, rather than less.[105] But expansive normative power comes at the expense of those who, under such a regime, will do worse than under a more tightly controlled one, even on their own understanding of their well-being.[106] Especially when recognizing consent is justified by its typical or aggregate benefits, the practice sacrifices some people's interests in order to promote the interests of others.[107]

It does not follow from these ambiguities in the concept of consent that we will necessarily disagree about whether consent is present in this or that case, or whether a party is bound to any particular obligation. It could be, for example, that the conception of consent that is relevant in any given consent is resolved, even if it is different from how the concept is used elsewhere. Unfortunately, such neat ordering within the concept is absent. We have not collectively sorted the varieties of consent

---

101. *See* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 123-24 (2008) (stating normative consent applies where it would be wrongful to withhold consent). While it is clearly not wrongful not to agree to most contracts, it is often rational by virtue of the market options available, *see id.* Thus, we might analogize and say consent exists because the terms are consistent with those available on the market, or even better, that the normative force of consent turns on these facts rather than the psychological event, *see id. But see* William A. Edmundson, *Consent and Its Cousins*, 121 ETHICS 335, 335 (2011) (doubting normative consent).

102. *See* Barnett, *supra* note 66, at 269.

103. *See* Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954); RESTATEMENT (SECOND) OF CONTS. § 17 (AM. L. INST. 1981).

104. *See, e.g.,* Daniel Brudney, *Hypothetical Consent and Moral Force*, 10 L. & PHIL. 235, 236 (1991) (denying force of hypothetical consent).

105. *See* David Owens, *The Possibility of Consent*, 24 RATIO 402, 416–17 (2011) (stating consent serves fundamental interest in controlling exceptions to our moral rights); *see also* Thomas M. Scanlon, Jr., The Tanner Lectures on Human Values at Brasenose College, Oxford University: The Significance of Choice 149–216 (May 1986).

106. *See* Hugh Breakey, *Without Consent: Principles of Justified Acquisition and Duty-Imposing Powers*, 59 PHIL. Q. 618, 631 (2009).

107. *See id.* ("Try as we may to hold certain duties or rights fixed, diverse individuals will respond to, and flourish within, the interstices provided by the rules in different ways and with different degrees of success. For some people, a given right will allow vistas of opportunity which another person simply does not have the physical or psychological wherewithal to exploit.").

by application. Instead, contestation about the boundaries of consent within each domain inform shifting understandings of consent in the others. While we have intuitions about the circumstances under which various considerations are most weighty, our own understanding of consent is likely to turn on the facts available to us.[108]

In each of the ambiguities discussed above, the two conceptions of consent at issue turn on distinct sets of facts.[109] Whether consent is effective only if it reveals endorsement, or whether it must at least accurately reveal relative preferences, is a mere theoretical disagreement for those without any information that could distinguish authentic from inauthentic consent. In particular, the consenting party then may be the only person who is in a position to know whether their apparent consent was deeply revealing in the way the more theoretically demanding understanding of consent would require.

Similarly, we might debate in principle what level of information, understanding and deliberation should be required before consent is taken to be binding. But the party receiving and acting on consent usually has little direct knowledge of whether any of those requirements, if applicable, have been met. In contract, the principle of objectivity does not usually require them to get it right but holds them only to what facts were known to them.[110] The consenting party, however, may come to learn that their consent was predicated on facts and an understanding that were incorrect; they may also simply come to see that the reasoning behind their consent was flawed. They will have access, then, to facts that cast doubt on the force of her earlier consent; but they alone will have such access.

Whether consent is relevant to deconstructing harm-doing turns on how long it survives.[111] Where the terms of consent do not expressly spell out the scope of its applicability, or its duration, the receiver of consent interprets it (probably in their own favor). The "fact of the matter" at issue is whether the consent was granted with the understanding it would apply in some new scenario—and again, the consenting party themself is best-positioned to know which possibilities were known to or contemplated by them.

Finally, consent is conceptually ambiguous about its own normative force. It is at least plausibly limited where it will not advance the actual interests of a consenting party, and may even result in harm.[112] Whether we are justified in treating

108. *Cf.* Tom Dougherty, *Sex, Lies, and Consent*, 123 ETHICS 717, 738 (2013).

109. *Id.*

110. *See* Klass, *supra* note 60, at 1437; *see* Barnett, *supra* note 66, at 270.

111. *See* Dougherty, *supra* note 108, at 725.

112. *See* Baker, *supra* note 100, at 93.

consent as justified will turn in considerable part on just how the party is effected by the harm.[113] If the impact is more severe, we are more likely to circumscribe the force of consent.[114] Again, the consenting party has the key to facts that will drive the force of their own consent, and its limitations.[115]

B. Four Examples

Contract appears to be on safe ground by enforcing only those obligations to which the parties have assented.[116] But as we have seen, it turns out to be a less determinate grounds for obligation than might have been hoped.[117] Four examples might illustrate the ways in which consent generates reactive discord about contract. The same principles that theoretically should reduce disagreement about what parties in contract owe each other potentially exacerbate disagreement. In each case, the problem lies with the distinct meanings of consent to the respective parties. Parties are likely to disagree about how and when consent binds them.

Scenario 1. Ann agrees to deliver widgets to Bao on June 1, 2023. When negotiating the date of delivery, Bao informed Ann that he expected to use the widgets in his factory in June 2023. However, supply chain disruptions cause the price of widgets to increase and delay delivery of other components that Bao needs to operate his factory. Bao will not be able to use widgets for production until August 2023. So, Bao enters into contract with a third party to sell the widgets owed by Ann at the new, higher market price of widgets. The profit Bao will make on resale of widgets and other pre-ordered items significantly exceeds the loss from delayed production at Bao's factory. Ann is unable to deliver the widgets on time in June 2023.

Bao can probably succeed in a breach claim against Ann. Ann's promise to deliver widgets by a given date was not made contingent on Bao's having personal use for those widgets at that time. Bao was never precluded from reselling the widgets. More broadly, Bao was not precluded from profiting from a rise in widget prices that would result in a windfall for Bao. Because Bao committed to paying a fixed price for the widgets, he bore the risk that the price of widgets would fall just as Ann bore the risk that the price of widgets would rise. Many scholars think that Ann is responsible for the difference between her contract price and the price Bao pays

113. *Id.*

114. *Id.*

115. *Cf.* Dougherty, *supra* note 108, at 730–31 (arguing that, in the sexual context, it is up to individuals to decide which facts are critical to their own consent).

116. A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 11 (2001) (describing consent as a "*clear* ground of obligation").

117. *See generally* Cowart, *supra* note 74.

for widgets from an alternate source.[118] Ann, however, may not regard her breach as giving rise to any legitimate claim for damages from Bao. After all, Bao is better off as a result of the market turn that has caused Ann to breach. Her view is at odds with the applicable legal norm.[119] While remedial principles limit Bao's recovery to ensure that he does not profit from her breach, they do not preclude him from making money at Ann's expense in light of market developments that affect price and delivery times.[120]

Ann might argue that it was her understanding that she was supplying widgets to Bao for Bao's own use. While at the time of contract, this fact may not have been salient to her, it is likely to appear significant to Ann in retrospect. When she recalls her own consent, it may appear predicated on the entirety of the facts as she knew them at the time of contract. But her legal assent is more circumscribed. It does not incorporate the entirety of her beliefs but only material facts and agreed terms.[121] Bao's intended use for the widgets is unlikely to be regarded as relevant to Bao's claim against Ann.[122] Nor will it be of legal import that the very market developments that caused Ann's breach are those that would render it inconsequential to Bao had he not altered his plans for the widgets.[123]

The divergence between how Ann and Bao would likely assess her breach turns on the fact that, when an agent consents to terms, her consent is not usually conditioned on some background facts rather than others. When we say that *ex post*—and from a distance—that consent was conditioned on particular beliefs or terms, we imply that we know the outcome of various counterfactuals: the agent would have accepted some offers but not others, in some states of the world but not others. But it may be more difficult for an agent to disaggregate her consent in this way. She will not regard as significant what she might have consented to but only what she did consent to, and she consented to the transaction rather than its various terms. Moreover, she consented to those on the basis of the entire set of beliefs she held. She likely did not test the work each belief did for her choice to contract, such that she could now say that this or that belief did or did not motivate her consent. When

118. *See* U.C.C. § 2-711 (AM. L. INST. & UNIF. L. COMM'N 1977).

119. *See id.*

120. *See* Hermalin et al., *supra* note 12, at 102.

121. *See generally* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000) (discussing the objective theory of contract formation).

122. U.C.C. § 2-301 (AM. L. INST. & UNIF. L. COMM'N 1977) (explaining that the obligations of parties in contract with one another are limited to the obligations imposed by the contract). It follows that the commercial intentions of the parties outside the scope of the contract are irrelevant to determining the parties' obligations to each other, *id.*

123. *See id.* Changes in market forces are irrelevant to determining the obligations of parties in contract.

beliefs are belied, even predictions, her consent may seem irrelevant to the state of the world that has materialized.

I do not doubt that not everyone in Ann's shoes would react in this way. My aim is to suggest that her reaction, as I have imagined it, is not alien but comprehensible given the phenomenology of her consent. And yet, Bao's reaction, which likely entails the expectation of compensation from Ann for her breach, is not only also intelligible but rightly endorsed by contract law.[124] This is because the institutional perspective on consent is one outside of the agent,[125] and this is the perspective of Bao with respect to the obligations that Ann assumed. To both the judge and Bao, Ann's consent is more narrow and nimble than she is likely to have experienced it.

Scenario 2. Dale is employed by Company on at-will terms. Dale needs her job because she cannot expect to find, without interruption, a job with similar compensation and benefits. Company increases Dale's workload but does not increase her compensation. Company subsequently reduces Dale's benefits. Dale scales back her effort at work. Company terminates Dale.

Absent employment protections outside of general contract law, Company's termination of Dale is not a cognizable breach.[126] Dale has no claim against Company, but she is likely to feel resentment, if not indignation, at her treatment at Company's hands. Without contract, sudden exit from a relationship on which the other is acutely dependent is probably wrongful. She may regard Company as bound by a moral obligation to give her notice, or even a second chance. Company, though, can rest on her waiver of any moral claim by virtue of her consent to at-will contract.[127] Again, Dale's reaction is intelligible even while Company's position is not only intelligible but endorsed by law.[128]

Again, the bases for Dale's consent to the terms of her employment is at issue. If her consent was effective, her agreement with Company may override or replace any existing default moral structure to their exchange. While there is little doubt that Dale accepted the terms of her employment for legal purposes, Dale likely did not experience her acceptance as a meaningful choice. She merely abided by the dictates of her predicament. That doing so would entitle Company first to increase

---

124. *See generally* U.C.C. § 2-711 (AM. L. INST. & UNIF. L. COMM'N 1977).

125. *See generally* Perillo, *supra* note 121.

126. *E.g.*, Ixchel Pharma, L.L.C. v. Biogen, Inc., 470 P.3d 571, 579 (Cal. 2020) ("An at-will contract may be terminated, by its terms, at the prerogative of a single party . . . .").

127. *See* Shelby Cnty. Cookers, L.L.C. v. Util. Consultants Int'l, Inc., 857 N.W.2d 186, 191 (Iowa 2014).

128. *See Ixchel Pharma, L.L.C.*, 470 P.3d at 579.

her burden without compensation and then terminate her when she readjusted the bargain to something closer to how it began may strike her as confused. What valuable normative power is reflected in her navigating the market to make ends meet? While Dale could take a step back and endorse both promise and consent as normative powers, her accession to the terms of her employment is unlikely to be experienced as an instance of either.

Company, though, did not place Dale in the situation that led her to accept their offer of employment. They were not responsible for her alternatives, or lack thereof. Only the fact of her agreement is known to Company. While Company could know that Dale would not be employed on its terms against a just background structure, its conduct is neither unique nor legally impermissible. Company, like a court, will conclude that Dale is bound by her agreement based on the narrow facts that speak to legal consent.[129] Consent, though, is a moral concept that is thicker; it is commonly understood to promote autonomy. Dale will not feel empowered here. She will be indignant.

Scenario 3. Gita rents twenty tables and one hundred chairs from Finn for an event that will be held at her venue. A government directive limits events to no more than 50 persons on the date of the event. Gita must return 60% of the rental price for her venue to the consumer to avoid total cancellation, which is permitted with refund under the government directive. Finn will not agree to halve Gita's rental order. Gita repudiates the contract.

Gita's repudiation will probably leave her responsible for damages, that is, Finn's lost profits on the contract. The doctrine of frustration of purpose could be used to imply a condition in the agreement that would excuse her, but at least in the United States, that doctrine has rarely been successfully invoked[130] and seems unlikely to operate here, where Gita is not prohibited entirely from renting out her venue. Gita could have managed her vulnerability by use of a force majeure or business interruption insurance. If she failed to do so, she probably would be deemed to bear the risk of a pandemic that renders the rental contract a liability.[131]

Gita might well regret her own failure to negotiate a different contract, or to obtain appropriate insurance. But these regrets may co-exist with resentment toward Finn. It may appear wholly arbitrary to her that Finn should enjoy all expected profits under the original agreement at her expense. The assignment of risk to Gita here

129. *See generally* 17 C.J.S. *Contracts* § 47 (2023).

130. *See* Lavneet Dhillon, *Abolishing the Doctrine of Frustration*, 54 U.C. DAVIS L. REV. 2605, 2606 (2021).

131. 175 Med. Vision Properties, LLC v. Adubor, 155 N.Y.S.3d 307 (N.Y. Sup. Ct. 2021); *see, e.g.*, Gap Inc. v. Ponte Gadea New York LLC, 524 F. Supp. 3d 224 (S.D.N.Y. 2021) (rejecting frustration of purpose defense).

does not track any conscious assumption of risk on her part. Nor could a court avoid such a result by assigning risk to Finn. Because the law either enforces the contract or not, in binary fashion, its result cannot distribute loss between the parties. But loss-sharing will likely seem like the right result to Gita. Reconstruction of the agreement in a way that allocates risk to her may be justified on policy grounds but it will not resonate with Gita. Constructive consent does not correspond to any cognitive moment when Gita chose to proceed with the understanding that a pandemic would leave her exposed. When Finn insists that she perform an obligation that she assumed on the assumption that the world would look different than it does, the consent he points to will seem hypothetical—and in that sense, unreal. Gita will not feel that she owes Finn that to which he will feel entitled. The court will take his side.

Scenario 4. Henry hires Irma to repair his roof by June 1. Irma completes the work by June 1, but Henry points out defects in the work and refuses to pay until all defects are repaired, as the contract permits. Irma is willing to repair the defects, but she needs desperately to be paid or she will default on a variety of payments, including mortgage payments on her home. Henry is not currently occupying the house, so he is not clearly affected by her failure to repair by June 1. Nevertheless, he refuses to pay before the work is finished.

If the defects in the roof work are material, Henry is not required to pay Irma before the work is properly completed.[132] Nevertheless, Irma might doubt that Henry has any moral right to withhold payment. While she consented to the contract provision that allows him to withhold payment until the work is fully done, the harm to her and her family that will result from Henry standing on that term might render her earlier consent inoperative from her current vantage point.

The problem is that Irma knows the full extent of her losses if Henry withholds payment, and she cannot credibly convey them to Henry. Moreover, Irma knows that she will complete the work in a timeframe that will make the delay inconsequential for Henry, but Henry cannot know this with any confidence. The result is that Irma will believe she is entitled to payment from at least a moral point of view while Henry, backed by law, will feel entitled to withhold it.

III. THE DIVERGENCE OF FIRST-PERSON AND SECOND-PERSON REASONING ABOUT CONSENT

I have abstained here from endorsing the judgments of either Anna or Bao, Company or Dale, or Finn or Gita, Henry or Irma, at the expense of the other. It

132. K & G Constr. Co. v. Harris, 164 A.2d 451 (Md. 1960) (holding that Defendant's withholding of payment was permitted in light of material construction defect).

may depend on facts that are not included. More important, it is because both parties have some merit to their perspectives that the disagreement is troubling. What I hope to have shown about these disputes, separate from their moral merits, is that the fact and effect of a party's assent to the terms of an agreement will often be plausibly different in the eyes of the two parties.

The problem is not avoided by avoiding the language of consent to describe the legal basis for enforcing these bargains. My argument does not depend on adopting a consent-based theory of contract. I use consent here only in the thin sense of indicating that a person has agreed or assented to the terms of the agreement, including the obligations they have assumed (promised) and the obligations of the other party, limited as they are. We could translate the problems of consent discussed here in terms of promise: in scenarios one and three, a party made a promise that they regarded as no longer binding on them while the other party regarded it as still operative. Their disagreement stems from an incongruity in the perspectives of promisor and promisee with respect to the scope and conditionality of the promise. Or in scenario two, a party understands theirself to be entitled to something from the other even though the latter never promised it (e.g. some measure of job security). The first party will not understand theirself to have forfeited moral rights that, from a legal point of view, they will have signed away when they agreed to abide by terms that did not include the right at issue.

Promise, like consent, is a power that we expect to wield knowingly.[133] After all, both are justified because they are supposed to be empowering.[134] When unintended, the bindingness of consent or promise can instead blindside an agent.[135] Unwitting exercise of normative powers does not appear to advance their purpose to an agent even if, from a more removed vantage point, we can see the justification for eschewing subjective recognition criteria. *Legal* recognition of promise or consent, even more clearly than outside the law, does not turn on an agent's self-conscious exercise of the normative power either.[136] While objectifying these moral concepts is amply justified, because parties do not step outside themselves in the manner of courts, they understand what they owe differently. Instead of cementing common ground, relying on mutual assent to govern contracting parties' obligations sets them on a course that will often lead to disagreement. Moral uncertainty about a rich concept like consent will generate disputes about contractual rights and obligations.

---

133. *See* MacCormick & Raz, *supra* note 73, at 61 (identifying promise and consent as normative powers).

134. *See id.*

135. *See id.*

136. *See id.* at 83.

In this Part, I offer a more specific account of how and why moral uncertainty about the concept of consent results in ex post disagreement. One might think that uncertainty simply results in random divergence because parties to a transaction might invoke distinct conceptions as a matter of chance. This would be true if the concept were uncertain in the simple sense that people disagree about it. But moral uncertainty here refers to uncertainty harbored by individuals, and the result is that disagreement about consent is more systematic. Instead of committing analytically to one conception of consent, which might or might not match that of our contracting party, we answer the questions of revealment, quality, relevance and force described supra in Part II differently from one situation to the next. We resort to the conception of consent that works with the facts we have; unfortunately, parties to a transaction have different facts.

A. The Availability Heuristic and Moral Reasoning Under Uncertainty

Although inconsistent, the conceptions of consent we bring to bear on our encounters do not vary arbitrarily. Instead, we rely on the conception that best fits the kinds of information available to us.[137] The phenomenon resembles, though is not strictly an example of, a well-documented cognitive phenomenon: the availability heuristic.[138] Psychologists have shown that we tend to rely on the facts that are most readily available to us when we make snap probabilistic judgments.[139] For example, if we were to quickly assess the probability that our friend will be late to meet us, we might give disproportionate weight to the few times when she was late with dramatic consequences (e.g., when she missed a flight or caused us to miss an appointment), forgetting the many more unmemorable occasions when she showed up before we did. Salient facts come to mind more quickly, and we give those facts outsized weight when making quick inferences about how the world works.[140]

The availability heuristic has been extensively studied, and psychologists have uncovered interesting cognitive dynamics in relation to it; many of those bear on the psychology of consent. One notable finding is that when participants are given an alternative explanation for the availability of a particular fact or kind of fact to their minds, the effect disappears.[141] That is, we abandon the heuristic when we are given an affirmative reason to believe it will misguide us. This has the promising

---

137. *See generally* Tversky & Kahneman, *supra* note 22.

138. *See id.*

139. *See id.*

140. *See id.*

141. Norbert Schwarz, *Accessible Content and Accessibility Experiences: The Interplay of Declarative and Experiential Information in Judgment*, 2 PERSONALITY & SOC. PSYCH. REV. 87, 96 (1998); Michaela Wänke et al., *The Availability Heuristic Revisited: Experienced Ease of Retrieval in Mundane Frequency Estimates*, 89 ACTA PSYCHOLOGICA 83, 88 (1995).

(or alarming) implication that features of the environment can be used to "improve" our decision-making.

An important extension of the availability heuristic in the context of moral reasoning found that the availability heuristic informs the degree to which we perceive a moral imperative, or the moral intensity of a choice.[142] Perceptions of moral intensity turn on underlying estimates about how many people are affected by the possible action, or the probability that particular consequences will follow from it.[143] Because the availability heuristic informs those estimates, it can similarly shape our attitude toward a moral choice, i.e., whether we recognize it as a moral choice at all.[144]

The availability heuristic was originally proposed as a feature of quick thinking, in contrast to slow, more deliberative cognitive processing.[145] However, its effects are sometimes more long-term than this understanding of it suggests.[146] Long-term effects appear to be mediated by abstraction.[147] When someone makes a general inference about a category using the availability heuristic, they may revert to that inference when they think about the category, without revisiting the underlying probability assessment that went into that inference.[148] Moving to abstraction may separately tend to cause us to underestimate probabilities.[149] The theory here is that because we tend to rely on abstraction to process improbable events, thinking abstractly about something imputes to it a sense of improbability and distance.[150]

---

142. Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACAD. MGMT. REV. 366, 372 (1991).

143. *See generally id.*; Sefa Hayibor & David M. Wasieleski, *Effects of the Use of the Availability Heuristic on Ethical Decision-Making in Organizations*, 84 J. BUS. ETHICS 151, 155 (2009).

144. *See* Hayibor & Wasieleski, *supra* note 143, at 155 ("The crux of our argument is that perceptions of the components of moral intensity hinge in part on frequency and/or probability estimates . . . and thus the influence of the use of the availability heuristic on such estimates should translate into effects on perceptions of moral intensity.").

145. *See* Tversky & Kahneman, *supra* note 22, at 210–11.

146. Krystin M. Corby & Donald Homa, *The Enduring Effect of Availability*, 124 AM. J. PSYCH. 189, 190 (2011).

147. *See id.*

148. Michael I. Posner & Steven W. Keele, *Retention of Abstract Ideas*, 83 J. EXPERIMENTAL PSYCH. 304, 304 (1970); Donald Homa & Richard Vosburgh, *Category Breadth and the Abstraction of Prototypical Information*, 2 J. EXPERIMENTAL PSYCH.: HUM. LEARNING & MEMORY 322, 322 (1976).

149. Cheryl Wakslak & Yaacov Trope, *The Effect of Construal Level on Subjective Probability Estimates*, 20 PSYCH. SCI. 52, 53 (2009).

150. *See id.*

A final relevant finding is that the availability heuristic operates more strongly when facts come to mind "easily."[151] Ease of retrieval here refers not just to salience, which is built into the original concept of the heuristic, but to the subjective experience of recall.[152] Thus, being asked to recall three facts of a certain type, if we can do so easily, will cause us to overestimate how many other such memories we have.[153] By contrast, being asked to recall a dozen such memories, by taxing our recall, will lead us to underestimate how many such memories we have.[154] Similarly, being directed to imagine a scenario will only raise our estimate of the probability of such scenarios if the proposed scenario is easy to imagine, such as contracting a disease that makes us cough as opposed to a disease that causes us to hallucinate about tornados.[155] However, the ease of retrieval effect goes away if we attribute our difficulty to a lack of personal knowledge and expertise on the topic at hand.[156]

These patterns in our epistemic judgments help illuminate how our moral judgments can be clouded by errors in the probabilistic assessments on which those judgments depend. For example, we may be more likely to regard someone as having acted under (and in contravention) to a duty when we learn that their actions resulted in injury. In such situations, the fact that the injury materialized might cause us (as a result of hindsight bias) to judge an excessively high probability of the accident occurring, which then leads us to conclude that the agent was subject to a duty to the victim all along.[157] The same dynamic might apply to judgments about general phenomena rather than specific retroactive causal assessments. For example, it appears that people are more likely to believe in climate change after they have personally experienced extreme weather.[158] One might think that similarly, a person who receives consent has a distorted understanding of the effect of

151. *See* Norbert Schwarz et al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCH. 195, 200–01 (1991) (explaining how the ease of retrieval affects operation of availability heuristic).

152. *Id.* at 201.

153. *See id.*

154. *See id.* at 195.

155. *See* Steven J. Sherman et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, 11 PERSONALITY & SOC. PSYCH. BULL. 118, 118 (1985).

156. Tybout et al., *supra* note 24, at 77.

157. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 572 (1998).

158. Laurie A. Rudman et al., *When Truth Is Personally Inconvenient, Attitudes Change: The Impact of Extreme Weather on Implicit Support for Green Politicians and Explicit Climate-Change Beliefs*, 24 PSYCH. SCI. 2290, 2294–95 (2013).

that consent only because they incorrectly gauge the probability of certain facts that might compromise the quality or force of that consent.

On this view, the availability heuristic explains disagreement about consent because receivers of consent simply fail to accurately predict the probability of certain circumstances surrounding consent.[159] These failures cause receivers to underestimate the moral significance of notions of consent that turn on those facts in the same way that we underestimate moral intensity of choices when we underestimate their consequences. One could argue further that both the difficulty of imagining and processing the circumstances of our contracting partners, as well as the process of abstraction invited by the concept of consent, exacerbate the risk of underestimating the significance of facts known only to the other party.

This reductive explanation is belied by the fact that receivers of consent do not always update their moral assessments upon receiving facts about the circumstances under which they obtained consent. Moreover, our roles as givers and receivers of consent are not fixed over time. Even if, in a given transaction, only one party's obligation is contested—and therefore, that party's consent is at issue—both parties consented to the terms of the deal and each of them is likely to have had their consent tested (i.e., to have found themselves bound where they did not feel bound) in some other transactional setting. Thus, the availability heuristic literally applied cannot account for any pattern of consistent divergence between the conceptions of consent employed by contracting parties. The disagreement is not reducible to a simple factual error; it turns on moral judgments about the applicable conception of consent.

Nevertheless, we rely on something akin to the availability heuristic even in the context of moral reasoning. While reflective deliberation may allow us to avoid privileging salient facts,[160] where a moral concept is ambiguous, we rely on an understanding of it that we are in a position to actually use. Since some conceptions of consent turn on a more comprehensive set of facts than others, we will revert to a narrower or broader conception depending on our epistemic position. We will tend to adopt the conception that lends itself to the facts available to us.[161]

---

159. *See generally* Tversky & Kahneman, *supra* note 22.

160. KAHNEMAN, *supra* note 87, at 137–38 (explaining availability heuristic is used in "System 1" quick thinking, not System 2 "deliberative" thinking).

161. *Cf.* Anuj K. Shah & Daniel M. Oppenheimer, *The Path of Least Resistance: Using Easy-to-Access Information*, 18 CURRENT DIRECTIONS PSYCH. SCI. 232, 233 (2009) (identifying the ease with which facts can be used to make judgments, or "cue evaluations," as informing the weight we assign those facts).

The epistemic position of a party that has granted consent is systematically different from that of the party that received it.[162] Many facts relating to revealment, quality, relevance, and force of consent are accessible only to the party granting consent.[163] Moreover, because the circumstances that "test" their consent arise only later, at the moment of consent, the grantor themselves may not focus on the facts that circumscribe their consent, let alone convey those to the receiver. The epistemic differences between the first and second-person perspectives parties thus drives a systematic wedge between parties' understanding of the obligations binding by consent. A party who finds themselves apparently bound by terms to which they think they did not "meaningfully" consent or which now result in obligations beyond the scope of their original intention will not treat the fact of their past consent as dispositive in the way that their counterparty is likely to do.

One might think that the problem of divergent conceptions of consent ex post is fleeting, inasmuch as it is the result of divergent epistemic positions, since the parties can be expected to exchange information once a dispute arises. However, parties will have formed fixed beliefs about the scope of their entitlements before disputes arise, and well before facts that undermine their own narrative of the transaction become known to them. They are likely to have elevated, in the meantime, their judgements about the bindingness of the other party's consent to the status of a belief.[164] They will receive information contrary to their initial inclination through a distorted lens.[165] Moreover, to the extent that they had any initial doubts about the mutual clarity and scope of their terms, they may react to that ambivalence of affirming a fixed view about the effect of the other party's consent.[166]

So far we have focused only on the ways in which receivers of consent might have a tendency to systematically discount understandings of consent which turn on the circumstances of the other party's consent. Givers of consent arguably are

---

162. MANSON & O'NEILL, *supra* note 21, at 37.

163. Jacob Ross & Mark Schroeder, *Belief, Credence, and Pragmatic Encroachment*, 88 PHIL. & PHENOMENOLOGICAL RSCH. 259, 267 (2014) ("[I]n virtue of our limited cognitive resources, we cannot avoid the heuristic of treating as true propositions about which we are uncertain.").

164. *Id.*; *see also* Weng Hong Tang, *Belief and Cognitive Limitations*, 172 PHIL. STUD. 249, 257 (2015) (recasting such reasoning as a heuristic).

165. Michael L. DeKay, *Predecisional Information Distortion and the Self-Fulfilling Prophecy of Early Preferences in Choice*, 24 CURRENT DIRECTIONS PSYCH. SCI. 405 (2015). DeKay observes the phenomenon in the context of choice rather than moral evaluation. *Id.*

166. *See* Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 204–05 (2010) ("The repression of doubts and reservations can also result in the use of a particular defense mechanism called reaction formation, by which the individual adopts, in an overly emphatic way, the opposite attitude of the actual conflicted and repressed feelings.").

subject to a counterpart distortion, namely "epistemic egocentrism."[167] The so-called "curse of knowledge" impairs our ability to disregard facts that only we know when evaluating the judgments of another person.[168] Thus, those who know their consent was based on poor information or a poor choice set, for example, may treat those facts as operative for the receiver even if the receiver had no knowledge of those facts.[169] We are less likely to make the mistake of epistemic egocentrism when we evaluate the judgments of someone we regard as an adversary.[170] However, though contracting parties may be at arms-length and regard each other as adversaries at the late stages of a dispute, they do not begin as adversaries. To the contrary, they may regard each other as partners (not of a legal variety) engaged in a cooperative exercise for mutual benefit.[171] That attitude may actually make it harder for a party to accept that the other party will not share their understanding of the applicable conceptions of consent, with its implications for that party's obligations.[172]

One might object to casting of the choice among conceptions of consent as contingent on one's role as either the receiver or giver of consent. After all, the bare fact that the two parties are likely consistently to disagree about the force of consent does not mean that there is no truth in the matter as to who is right.[173] My aim in this paper is not to defend any particular conception of consent, or to defend the idea that there is a single conception that ought to dominate the others. Instead, my point is to show that parties are likely to disagree and both of their positions resonate with strong moral intuitions we have about the concept of consent. Indeed, even when both parties harbor those intuitions, they are likely to disagree about how consent operates in particular transactions.

---

167. *See* Edward B. Royzman et al., *"I Know, You Know": Epistemic Egocentrism in Children and Adults*, 7 REV. GEN. PSYCH. 38 (2003).

168. *Id.* at 38, 43.

169. *Id.* at 39.

170. Nicholas Epley et al., *Perspective Taking as Egocentric Anchoring and Adjustment*, 87 J. PERSONALITY & SOC. PSYCH. 327, 337 (2004).

171. *See id.* at 328.

172. *See id.*

173. One might analogize to the debate about whether the ascription of truth-knowledge to a subject is contingent salience of potential errors to the ascriber of knowledge, i.e., a third-evaluating the subject's judgment, or the salience of potential errors to the subject herself. *See* Stewart Cohen, *Knowledge, Assertion, and Practical Reasoning*, 14 PHIL. ISSUES 482, 483 (2004). Here, I am not arguing that the force of consent turns on the facts as known to the consenting party, let alone her preferred notion of consent; nor that they turn on the facts known or conception preferred by the other party.

B. Contract Law and its Conception of Consent

Contract law manages the problem of conflict over consent by offering clear answers to many of the legal questions that would be implicated by the bounds of consent. This strategy is notably unlike the approach that law takes with respect to some other cognitive biases, in which the law attempts to "de-bias" people through various decision-making frameworks.[174] In contract, the law does not merely seek to guide; it takes a substantive position on the applicable notion of consent.[175] That conception is objective and narrow.[176] With respect to each of the four ambiguities identified in Part II, contract law picks a side so it can use the fewest facts to deliver a determinate result on matters of contract validity and enforceability.

First, the legal institution of contract is wholly indifferent to whether the consenting party endorses the terms or activity for which she grants permission. Contract law takes consent to reveal a preference for the terms of contract over the obligational state of the world prior to contract[177]; and that is all. Because contract law treats initial entitlements as fixed, it does not have the resources to take into account whether the choice set within which parties made their decision to contract allows them to reveal anything about their absolute attitudes toward the enterprise undertaken.[178] Contract law presumes only that consent to contract reveals a relative preference for the terms over the background state of affairs.

The second axis of ambiguity is where contract comes closest to accommodating moral uncertainty, but it is largely unsparing with respect to the quality of consent as well. Outside of the narrow confines of procedural unconscionability, courts assume that parties understood and thought about the terms they were accepting.[179] There is more indeterminacy on the matter of information: the doctrines of mistake

---

174. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 986 (2006) (describing legal tools for "de-biasing").

175. Barnett, *supra* note 66, at 269, 284.

176. *Id.* at 284–85.

177. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 308–12 (6th ed. 2003). Contracts are almost Pareto-superior in that parties prefer their terms to the status quo. *Id.*

178. This position is reflected most clearly in the law of duress. While courts might sometimes write as if duress is present when the circumstances compromised a party's capacity to consent, "[c]ourts making statements to this effect would not likely carry them to their logical conclusion . . . ." 28 WILLISTON ON CONTS. § 71:8 (4th ed.). Instead, excuse on grounds of duress usually requires showing that the other party made an improper threat. *Id.* Threats by one's prospective counterparty amount to only a rarified fraction of the circumstances under which people accept terms they do not "endorse" in a more complete sense. *Id.*

179. *See* 7 CORBIN ON CONTS. § 29.4 (rev. ed. 2002) (noting that "most [unconscionability] claims . . . fail" and findings of unconscionability on the basis of a bad bargain are "rare"); *see also* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1386 (2014) (offering history of doctrine).

and misrepresentation allow that parties operating under certain false facts may avoid their contractual obligations.[180] But those doctrines are also fairly narrowly drawn to be limited to only those facts that would render a party's decision to contract almost unintelligible, or errors for which the other party was in some way responsible.[181]

Third, with one important caveat, contract takes the duration of contract to be whatever the parties reasonably understood it to be, taking into account context.[182] Usually, this means that the obligations persist until fulfilled.[183] The important exception is for ongoing contracts that do not conclude upon the execution of a single sale. Here contract law balks at perpetual obligations and implies a right of exit.[184]

Finally, the force of consent is vast in contract. Parties are entitled to assume obligations or forfeit rights for little consideration (as long as there is some element of exchange).[185] The only outer boundary is set outside of contract by public policy.[186] Some obligations, such as those amounting to involuntary servitude, or less drastically, severe limitations on competition, are impermissible. But within the bounds of legality and public policy, contract law allows no further assessment of whether a package of rights and obligations is properly understood to excuse one party of moral responsibility for harms that the other incurs. When one party's losses are sufficiently grave, they can always turn to bankruptcy. But again, contract

---

180. RESTATEMENT (SECOND) OF CONTS. § 151–54 (AM. L. INST. 1981) (outlining doctrines of mutual and unilateral mistake); *Id.* § 159–64 (outlining doctrine of misrepresentation).

181. Mistake requires error as to a "basic assumption," *id.* at § 151–54, and misrepresentation turns on conduct by the party from whom relief is sought, *id.* at § 159–64.

182. *See, e.g.*, Shelby Cnty. Cookers, L.L.C. v. Util. Consultants Int'l, Inc., 857 N.W.2d 186, 191 (Iowa 2014); Derthick Associates, Inc. v. Bassett-Walker, Inc., 106 F.3d 390 (4th Cir. 1997); Matter of Estate of Wallis, 659 N.E.2d 423, 427 (Ill. App. Ct. 1995).

183. *See* Waterford Twp. v. City of Northfield, No. A19-0234, 2019 WL 3774615, at *2 (Minn. Ct. App. Aug. 12, 2019).

184. *See id.* ("Because perpetual contracts are generally disfavored as a matter of public policy, we will only enforce such a contract if its terms unambiguously express an intent for perpetual duration . . . . Similarly, if a contract is silent as to duration, we construe the contract to be indefinite in duration, not perpetual."); Glacial Plains Coop. v. Chippewa Valley Ethanol Co., 912 N.W.2d 233, 237 (Minn. 2018) ("A contract of indefinite duration is terminable at will upon reasonable notice to the other party after a reasonable time has passed.").

185. *See* Batsakis v. Demotsis, 226 S.W.2d 673, 675 (Tex. Civ. App. 1949) ("Mere inadequacy of consideration will not void a contract."); *see also* RESTATEMENT (SECOND) OF CONTS. § 79 (AM. L. INST. 1981) ("If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged.").

186. RESTATEMENT (SECOND) OF CONTS. § 178 (AM. L. INST. 1981) (contracts against public policy are unenforceable).

law itself offers no recourse, and it does not point fingers at the party whose transactional conduct might have precipitated calamity for the other.[187]

We should note that, by favoring a narrow conception of consent, contract law eschews a potential strategy for reducing the divergence between the parties and their thinking about their respective obligations. The rules could go further than they do in inducing information disclosures to the other party. For example, under *Hadley v. Baxendale*,[188] parties are motivated to disclose at the time of contract any special damages they might incur as a result of breach; they otherwise cannot collect those damages.[189] Parties are not similarly induced to share information that might affect the contours of their consent because the legal conception of consent that prevails in contract deems most of those facts irrelevant.

One might think that a long-standing legal verdict on the potential uncertainties of consent would put an end to moral uncertainty in a given society. But however influential legal norms may be on social norms and our understanding of moral concepts, consent is a concept that does too much work for us outside of contract for its content to be controlled by common law adjudication. Nor do people set its complexity to the side when they arrive at the door of contract. Contract is a kind of agreement; it involves an exchange of promises; it is too continuous—even if ultimately distinct from—other social practices to deploy a free-standing concept under an identical name.

We are left, then, with a legal concept of consent that does not track the way parties use the concept—at least not both parties to any given transaction. Those parties have access to different facts and may default to distinct conceptions. Most of the time, parties design contracts for mutual gain and realize those gains in some measure. For better or worse, life is not so exciting that unexpected events derail agreements all the time. But when things do go wrong, I have tried here to explain why one party may think their consent does not bind them in the way that the other believes that it does.

IV. CONCLUSION

Most people do not like conflict and it is one of the important functions of law, perhaps especially private law, to manage and preempt interpersonal conflict.[190]

187. *See* Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878, 1911 (2011) (arguing that contract law purports to inoculate parties from responsibility for the harms visited on their counterparties through their agreements).

188. 156 Eng. Rep. 145 (1854).

189. *Id.*

190. *See generally* Oman, *supra* note 41.

Conflict can result from disagreement about what actually happened but often it results from disagreement about what the parties to the interaction owed each other.[191]

Consent—understood as assent to a right, obligation, or some constellation thereof—seems like a promising way to minimize ex post disagreement about how one party has treated another. After all, discord is often rooted in disagreement about rights and obligations, and consent aims to settle the matter up front. In contract, both parties consent to terms; these terms usually purport to displace any antecedent rights and obligations that the parties held.

This article has considered the limits of consent to the problem it appears so elegantly to solve. Consent is a widely deployed concept with a life outside of contract. Its wide application reveals and entrenches ambiguities about what consent requires and what it can do. Each of the ambiguities that I have identified imposes a more or less demanding standard for effective consent, or a more or less deferential understanding of what it can do. In each case too, the more demanding and less deferential notion of consent looks to a broader set of facts than the other to decide what work consent has done. The additional breadth comes from facts uniquely in the possession of the party that granted consent. This separation between the factual predicates of competing notions of consent, and the divergent sets of facts available to the parties to an interaction subject to ostensible consent, ends up driving conflict rather than preempting it.

We can expect the problems of consent explored here to be more significant in some contractual contexts, and considerably worse outside the context of contract. Outside of contract, as in health care and in sex, legal rules have not had hundreds of years to permeate people's thinking about the circumstances of consent and when it is binding. I have not explored the legal ramifications of divergent attitudes to consent outside of contract, but one systemic policy response that makes sense in and outside of contract is to promote the conditions of meaningful consent before consent is granted—or extracted. That is, because many of the qualifications on the scope, quality or force of consent that I observed in Part II are associated with a lack of power, choice and information. Promoting material and social equality between persons should help fortify consent that arises out of those relationships. Instead of taking the moral force of consent for granted, we should create the social conditions for realizing its potential as an individual normative power that allows us to shape the terms on which we deal with each other.

Within the world of contract law, there are broadly two kinds of responses to the moral ambiguity of consent. First, regulatory rules for specific types of

191. *See generally* Bagchi, *supra* note 40.

transactions should take into account perceived problems with consent that undermine the legitimacy and efficacy of contract enforcement in their specific domains. For example, contracts for personal services or personal data might engage with one party's more complex understandings of consent even when the other party regards the contract as based on a far narrower conception.[192] Transactional rules in those contexts should take into account patterns of divergent consent in detailing the conditions and boundaries of binding transactions and mandatory opportunities for exit.

Athough the ramifications of ambiguity in consent are especially acute for some kinds of contract, inconveniently, the basic problem is pervasive. A second, ex post response is required at the stage of adjudication. Even if we accept the premise of our market system that people are free to trade (most of) the entitlements they have, irrespective of how they got them and how those compare with the entitlements of others, at the stage of enforcement, more open-ended rules of interpretation and equitable doctrines can be (and already are) deployed to mitigate the harshest effects of mythologized consent. If we understand that the conception of consent in contract is contested and imperfectly aligned with our moral intuitions, we can be more flexible at the margins, rendering the basic institution stronger as a result.[193]

The upshot is not, then, that we should abandon consent as a moral or legal device. The power of controlling the terms on which we deal with others is valuable to us all, albeit not equally valuable to all of us. Consent is usually a power that helps us manage our entitlements and relationships both. Still, in light of its moral ambiguity and the persistent conflict that such ambiguity leaves in its wake, we might sometimes conclude that what passed as consent was not consent after all, and contract not an instrument for mutual cooperation but rather a moral distraction that clouded our recognition of harm as wrongdoing.

---

192. *See* Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1886 (2013) (describing the complexity of consent for individual sellers of personal data).

193. *See* Aditi Bagchi, *The Contingent Politics of Legal Formalism*, *in* WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 467 (Shyamkrishna Balganesh et al. eds., 2022) (arguing that legal systems should sustain "system regret" by remaining alert and responsive to the normative costs of background choices).