THE MANY FACES OF CONTRACTUAL CONSENT[1]

Orit Gan[*]

ABSTRACT

Consent, a powerful concept that lies at the heart of contract law, has received a great amount of scholarly attention. Recently, some contract law scholars have been criticizing consent and suggesting alternative concepts. Contrary to this approach, this Article offers a nuanced description of consent that could pave the way for a better application of consent in contract law. Currently courts mainly examine whether consent is informed and freely given. However, this is a narrow conception of consent that does not reflect the complex nature of consent in reality. According to the model of consent suggested in this Article, consent is gradual and continuous, contextual and nuanced, and socially constructed. Consent should not be framed in black-or-white terms. Rather 'consent' and 'no consent' are two ends of the spectrum, with middle grounds of consent in between. Furthermore, consent is shaped by the relations between parties and the subject matter of the contract. Moreover, consent is not only the private matter of the parties' intentions but is shaped by social circumstances and public policy considerations and thus has public aspects. By exploring the many shades of consent, this Article may serve as a starting point in the development of a diverse and heterogenic yet useful and practical concept of consent.

1. This title borrows from William N. Eskridge Jr. *See* William N. Eskridge Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 47 (1995).

* Sapir College. Visiting Scholar, Columbia Law School (2010–2012). For their helpful comments, I would like to thank Erez Aloni, Yael Braudo-Bahat, Sidney DeLong, Elizabeth Emens, Martha Ertman, Zohar Gan, Nir Kedar, Nancy Kim, Charles Knapp, David Kretzmer, Chunlin Leonhard, Shahar Lifshitz, Peter Linzer, Meredith Miller, Ariel Porat, Deborah Post, Debora Threedy, Eric Zacks, and the participants at the faculty seminar at Sapir College and at the XI International Conference on Contracts, St. Mary's University School of Law, San Antonio, Texas.

I. INTRODUCTION

The concept of consent lies at the heart of contract law. In theory, it is widely recognized as a powerful concept; in practice, however, courts often struggle to identify, examine, and apply consent.[2] This Article seeks to bridge the gap between consent as a fundamental theoretical concept and its troubled practical application. While it does not endeavor to provide a rigid definition of consent, this Article offers a nuanced description of the concept that could pave the way for a better application of consent in contract law. In light of the current problematic application of consent in contract law, some scholars suggest seeking alternative concepts.[3] Other scholars, facing the complexity of the concept of consent, address only one of the many aspects of consent or focus only on specific type of contracts (e.g., standard form contracts).[4] This Article, in turn, seeks to maintain the primacy of the concept of consent, without disregarding its complexity. It does so by offering a rich, layered model of consent, based on a combination of multiple elements of the concept.

At present, courts ascribe only a narrow meaning to consent, namely, that consent is either informed and freely given, or it is not.[5] However, consent is not simply a "yes-or-no" question; consent is more complex than such an analysis suggests and can be both gradual and continuous. Rejecting a binary framework which views consent as an on-or-off concept, this Article

2. *See* discussion *infra* Part II.B.

3. For example, see the scholarship of Chunlin Leonhard *infra* notes 56–58 and accompanying text and the scholarship of Omri Ben-Shahar *infra* notes 114–17 and accompanying text.

4. *See infra* notes 226–28 and accompanying text (discussing scholarship on consent and standard form contracts).

5. *See* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 67–68 (2012) (discussing the general requirements of consent).

asserts that consent is better understood as a spectrum that ranges from "no consent" to "solid consent," and that contains many gray areas in between.[6] These gray areas include, but are not limited to, hesitation, deliberation, negotiations, mixed feelings, and reservations. Further complicating the matter is the fact that consent is often contextual.[7] Consent is shaped by the relationship between the consenter and the consentee. Factors of power, intimacy, trust, arm's length relations, and more all differently influence consent. Moreover, consent is socially constructed. Factors such as gender, race, and class directly influence the choices and constraints present for both parties in the background of a consensual decision, as do factors such as social context and policy considerations. As such, consent to a prenuptial agreement, consent to an employment agreement, and consent to a consumer contract must be recognized as distinct from one another, in that they are shaped by their unique social contexts. In other words, consent must be recognized as deriving not only from the individual mindsets of the parties, but also from the relevant public and social circumstances.

Consent has many faces, and this Article aims to develop a more robust understanding of consent by shedding light on its diverse characteristics, and thereby to improve the law's application of consent. By exploring the many shades of consent, this Article may serve as a starting point in the development of a heterogenic, diverse, colorful, and pluralistic concept of consent.

This Article proceeds as follows: Part II of this Article explores the gap between the primacy of consent in contract law theory, on the one hand, and the vagueness of consent in practice, on the other. Included in this exploration is a critique of the narrow and limited framework of consent currently utilized in contract law.

Part III offers a model of consent based on a deeper and more developed understanding of the concept. In addition to the informed and voluntary aspects of consent, this Part analyzes three more aspects of consent: continuum, context, and public policy. The first of these, the continuum aspect, offers a lens with which to view consent as gradual and nuanced, rather than binary and dichotomous. The second additional aspect, context, focuses on three examples—spousal agreements, employment agreements, and standard form contracts—in order to demonstrate the ways in which consent must be viewed as contextual. The third aspect explored in Part III is the connection between public policy and consent. Consent, this

6. *See* discussion *infra* Part III.A.
7. *See* discussion *infra* Part III.B.

Article argues, is socially constructed and shaped by public policy considerations that extend beyond the contracting parties' choices, intentions, and relationships. Part III concludes by illustrating the relationship between these three aspects as a series of concentric circles (see:

Figure 1). By highlighting the layered approach to the concept of consent, this Article hopes to further develop and enrich the law's understanding and application of contractual consent.

II. CONSENT IN THEORY AND IN PRACTICE

While consent is a cornerstone of contract law, it remains an elusive and nebulous concept in practice. This Part explores this gap and offers a critique of the narrow and limited version of consent currently used in contract law.[8]

A. *Consent in Theory*

Consent is widely held to be one of the pillars of contract law.[9] Assessing consent is key in the formation[10] and interpretation of contracts. Contract formation[11] hinges on the moment of mutual assent,[12] and indeed

8. *See generally* Margaret Jane Radin, *From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructure of the Market*, 54 OSGOODE HALL L.J. 339 (2017) [hereinafter Radin, *From Babyselling to Boilerplate*] (noting the "disconnect between the rationale and the practice" in contract law).

9. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296–300 (1986) [hereinafter Barnett, *A Consent Theory of Contract*]; Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 251 (Franklin G. Miller & Alan Wertheimer eds., 2010); Leonhard, *supra* note 5, at 58; Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994).

10. *See* Val Ricks, *Assent Is Not an Element of Contract Formation*, 61 KAN. L. REV. 591, 593 (2013) (noting "[c]onsideration subsumes assent"); *see also* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1107–09 (2006).

11. *See, e.g.*, Roland v. Ford Motor Co., 655 S.E.2d 259, 263 (Ga. Ct. App. 2007) (outlining the elements of contracts under Georgia law); Mallory v. City of Detroit, 449 N.W.2d 115, 118 (Mich. Ct. App. 1989) (outlining the elements of contracts under Michigan precedent).

12. *See, e.g.*, Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1829 (2004) [hereinafter Ben-Shahar, *Contracts Without Consent*]; Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contract—A Two-Part Critique of* Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (*Part I*), 62 CLEV. ST. L. REV. 373, 429–30 (2014) [hereinafter Feldman, *Mutual Assent*]; Peter Linzer, *Is*

the concept of a contractual promise itself depends on consent by the promisor.[13] Contractual defenses such as fraud,[14] misrepresentation,[15] duress,[16] undue influence,[17] and lack of capacity are all premised on invalid consent. Contract interpretation seeks first to consider the intent of the contracting parties.[18] Intent itself is required for both mutual assent and promise, and thus is an integral part of the parties' consent.[19]

Contract enforcement, too, draws its justification from the consent required in the formation of contracts.[20] It is the concept of consent that distinguishes contract law from other areas of private law, such as torts, as well as from status, such as marriage.[21] Consent plays a significant role in promoting cooperation, autonomy, efficiency, and freedom of contract.[22] Consent also plays a justifying and legitimizing role in the law by delineating between legal and illegal, right and wrong, legitimate and illegitimate.[23]

Consent the Essence of Contract?—Replying to Four Critics, 1988 ANN. SURV. AM. L. 213, 220 (1988); Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 146 [hereinafter Linzer, *Uncontracts*]. According to Barnett, *assent* means subjective intent to be legally bound while *consent* means objective manifested intention to be legally bound. Barnett, *A Consent Theory of Contract*, *supra* note 9, at 299 n.121; *see also* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 654–55 (2012) [hereinafter Barnett, *Contract Is Not Promise*]. The words "assent" and "consent" are used interchangeably throughout this Article.

13. RESTATEMENT (SECOND) OF CONTRACTS § 2 (AM. LAW INST. 1981); *see also* P.S. ATIYAH, PROMISES, MORALS, AND LAW 178 (1981).

14. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162.

15. *See id.* § 159.

16. *See id.* § 174.

17. *See id.* § 177.

18. Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1025 (2009) ("Honoring the contractual intent of the parties is the central objective of contract law.").

19. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 2, 20.

20. *See* Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 471.

21. *See id*. at 433 & n.16.

22. *See id*. at 435, 466–74.

23. *See* Larry Alexander, *The Moral Magic of Consent (II)*, *in* LEGAL THEORY 165 (Larry Alexander et al. eds., 1996); Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 22–33 (2010); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 *passim* (1989); Heidi M. Hurd, *The Moral Magic of Consent*, *in* LEGAL THEORY 121 *passim* (Larry Alexander et al. eds., 1996); Heidi M. Hurd, *The Normative Force of Consent*, *in* THE ROUTLEDGE HANDBOOK ON THE ETHICS OF CONSENT *passim* (Peter Schaber ed.) (forthcoming

Indeed, the importance of consent is emphasized by a wealth of existing scholarship. One foundational example of such scholarship is Randy Barnett's consent-based theory of contract. In this work, Barnett suggests that "legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights. Within an entitlements approach, contractual obligation, as distinct from other types of legal obligation, is based on that consent."[24] Charles Fried's contract-as-promise theory also relies heavily on the concept of assent.[25] In Fried's view, the promisor is legally bound to keep her promise because she intentionally gave the promisee moral grounds on which to expect promise performance.[26] In addition, autonomy theories of contract are also based on consent.[27] Under these theories, the enforceability of contracts promotes individual freedom, as contracts rely on autonomous choices made voluntarily by informed, mentally competent adults.[28] Finally, under economic theories, contractual transactions reflect socially desirable behavior and enhance social welfare, in that contracts are based on consensual transactions by competent parties with access to full information and without coercion.[29]

B. *Consent in Practice*

Contracts formed without negotiations between the parties undermine the robust consent requirement. Such contracts are referred to variously as standard form contracts, contracts of adhesion, boilerplate contracts, or wrap contracts. In standard form contracts, fair notice alone is deemed sufficient for the formation of the contract, even absent explicit consent. In other words, the mere opportunity for consent, combined with the absence

2017); *see also* Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 171–72 (2012) (arguing that consent gives legitimatization so consenters are blamed, enabling contract drafters to misuse cognitive bias or consenters).

24. Barnett, *A Consent Theory of Contract*, *supra* note 9, at 300.

25. *See* CHARLES FRIED, CONTRACT AS PROMISE 1 (1981).

26. *Id.* at 14–17; *see also* Peter Benson, *Contract as Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1730–31 (2007) ("Consent, understood as the mutual assents that transfer ownership, is the whole foundation of contract.").

27. *See, e.g.*, ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 24–26 (5th ed., 2013).

28. *See* FRIED, *supra* note 25, at 77–78.

29. *See* SCOTT & KRAUS, *supra* note 27, at 26–28. Although there are some contract law theories that focus instead on reliance, on relationships between the parties, or on contracts' social benefits, consent lies at the heart of many contract theories. Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 361.

of objection, is enough.[30] Enforcement of standard form contracts is thus based not on actual consent, but rather on implied consent,[31] with an affirmative duty to read the contract imposed on contracting parties.[32] Despite the fact that studies show people generally do not read the boilerplate contracts to which they become parties by default, the aforementioned basis for enforcement of standard form contracts persists.[33] In this context, consent is rendered essentially meaningless, as the contracting party neither knows nor understands the agreement to which she is deemed to have consented.[34] Efficient and ubiquitous though they might be, standard form contracts are not based on consent.

Many scholars have addressed the problematic nature of consent in standard form contracts.[35] As Charles Knapp observes, "Both in the world of paper contracts and in the world where contracts are only 'virtual,' contract law is seemingly moving inexorably toward a state in which neither the presence nor the absence of actual consent has any real significance."[36]

30. *See* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996) ("A buyer accepts goods . . . when, after an opportunity to inspect, he fails to make an effective rejection . . . .").

31. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 21 (2013).

32. *See* John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 341–42 (1974); Avery Katz, *Your Terms or Mine? The Duty to Read the Fine Print in Contracts*, 21 RAND J. ECON. 518, 519 (1990); Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083 *passim* (2015); Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1051–69 (1966); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002).

33. *See* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1–2 (2014); Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*: *Comments on Florencia Marotta-Wurgler's Studies*, 12 JERUSALEM REV. LEGAL STUD. 137, 145–46 (2015).

34. *See* Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1, 7–12 (2009).

35. *See, e.g.*, Bell, *supra* note 23, at 36; Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 449 (1995) ("The idea of mutual assent is clearly an illusion in most contracts involving the use of a form provided by one of the parties."); Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Conomy?*, 78 WASH. L. REV. 265, 274–75 (2003).

36. Charles L. Knapp, *Contract Law Walks the Plank:* Carnival Cruise Lines, Inc.

In the same vein, Nancy Kim argues: "Courts routinely enforce wrap contracts where consumers have no intent of entering into a contract. The requirement of manifestation of consent seems to be subsumed in wrap contract cases with issue of notice."[37] Margaret Radin similarly critiques the lack of consent in standard form contracts, concluding they should be governed not by contract law but by tort law.[38] She terms the problematic nature of consent in standard form contracts as "normative degradation," by which she means that boilerplates are used—in the name of contract—to abrogate rights without consent.[39] In her analysis, Radin distinguishes between World A, the world of truly consensual agreements, and World B, the world of boilerplate contracts with eroded consent.[40] While consent in World A is indeed more robust than consent in World B, this Article suggests that even the former is imprecise and flawed in its practical application of the concept. As discussed further below, consent to negotiated contracts is itself problematic, albeit for different reasons than those highlighted by Radin and other scholars as plaguing standard form contracts.

As a result of a narrow understanding of the meaning of consent, courts often apply a limited test that requires only objective manifestation of consent.[41] This objective manifestation test does not rely on the *actual* intentions of the parties;[42] instead it relies exclusively on the outward manifestations of intent,[43] as measured objectively from the point of view of

v. Shute, 12 NEV. L.J. 553, 562 (2012); s*ee also* Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 114 (2006); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 770–76 (2002).

37. KIM, *supra* note 31, at 128.

38. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 197–216 (2013) [hereinafter RADIN, BOILERPLATE]; *see also* Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 351 ("Full contractual consent and fully free private ordering is ideological, not characteristic of any real market society.") and at 360 ("Standardized contracts—I should say alleged 'contracts' —are causing a disconnect between the rationale for contract enforcement and how these 'contracts' actually function in the world.").

39. Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 363.

40. RADIN, BOILERPLATE, *supra* note 38, at xiii–xvii, 19.

41. *See* Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954); *see also infra* note 81 and accompanying text.

42. Menachem Mautner, *Contract, Culture, Compulsion, or: What is so Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES L. 545, 551 (2002).

43. First Nat'l Exch. Bank of Roanoke v. Roanoke Oil Co., 192 S.E. 764, 770 (Va.

the other contracting party, and with what is known as the "reasonable person" standard.[44] The objective manifestation test is primarily concerned with the reasonable reliance of the consentee and does not take into account the protection of the consenter.[45] This is highly problematic, in that the manifestation of consent might very well be divorced from actual, genuine consent. In this light, it would seem that the objective manifestation test may often be insufficient in terms of protecting the autonomy and interests of the consenting party.[46]

An examination of current doctrines of invalid consent also serve to demonstrate the courts' flawed view of consent. Doctrines such as duress,[47] undue influence,[48] misrepresentation,[49] and fraud[50] seek to ensure that entry into a binding contract is voluntary and based on accurate and full information.[51] According to these doctrines, consent may be rendered invalid if it is found that it was coerced[52] or derived from incomplete, inaccurate, or inadequate information.[53] In addition, under these doctrines, valid contract formation requires that both contracting parties have the capacity—in age and mental fitness—to enter into a binding agreement.[54]

1937).

44. *Lucy*, 84 S.E.2d at 522.

45. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1142 (2008).

46. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 49 (1980); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 884 (1978) [hereinafter Macneil, *Contracts: Adjustment of Long-Term Economic Relations*]; Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 362.

47. RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. LAW INST. 1981).

48. *Id.* § 177.

49. *Id.* § 159.

50. *Id.* § 162.

51. *See* Bix, *supra* note 9, at 252–55; Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179 *passim* (2005).

52. *See generally* Alaska Packers' Ass'n v. Domenico, 117 F. 99, 102–03 (9th Cir. 1902) (holding that a party cannot breach a promise by demanding more than already agreed upon and then bring suit on a supposedly new or altered promise).

53. *See generally* Vokes v. Arthur Murray, Inc., 212 So. 2d 906, 908–09 (Fla. Dist. Ct. App. 1968) (citations omitted) ("Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so he must disclose the *whole truth*.").

54. RESTATEMENT (SECOND) OF CONTRACTS § 12.

While these doctrines are inarguably necessary for ensuring meaningful consent, they are by no means sufficient. They focus only on will, capacity, and information, while disregarding other factors critical to shaping consent—factors such as relational context and social context, which will be discussed at length in the following Part.

As stated above, there has been a recent surge in scholarly critique of the role of consent in contract law.[55] For example, Chunlin Leonhard describes the phenomenon as the "[u]nbearable [l]ightness of [c]onsent,"[56] and argues that consent can be a fictitious, elusive, and even manipulative concept.[57] Leonhard thus advocates substituting consent for another test, namely, "the totality of the circumstances."[58] While recognizing the importance of Leonhard's work, this Article takes a different view. Rather than replacing consent with another concept altogether, this Article seeks, in the following Part, to develop a broader, richer, and more nuanced notion of consent.

C. *Consent: Theory and Practice*

Consent is widely recognized as bearing great doctrinal and theoretical importance; its proper application, however, lags far behind. Courts consistently face, in practice, significant difficulties in describing, identifying, and examining consent.[59]

The gap between the importance of consent in theory and the vagueness of consent in practice is relevant to other areas of law. Consent differentiates an enforceable contract from an unenforceable contract;[60] a

55. Ben-Shahar, *Contracts Without Consent*, *supra* note 12, at 1830; Bix, *supra* note 9; *see also* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 3–4 (1989); Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 152 (1980); Leon E. Trakman, *Public Responsibilities Beyond Consent: Rethinking Contract Theory*, 45 HOFSTRA L. REV. 217, 217 (2016).

56. Leonhard, *supra* note 5, at 57.

57. *Id.* at 60–61.

58. *Id.* at 85–90.

59. *See, e.g.*, *id.* at 60 ("[C]onsent is an amorphous, difficult-to-define concept . . . ."); Melanie A. Beres, *'Spontaneous' Sexual Consent: An Analysis of Sexual Consent Literature*, 17 FEMINISM & PSYCHOL. 93, 106 (2007) ("[C]onsent is both obvious and hard to figure out . . . ."); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 417 (2016) ("[C]onsent is far from clear.").

60. *See* Leonhard, *supra* note 5, at 73–77.

medical procedure from battery;[61] use of land from trespass;[62] a valid police search from an invalid police search;[63] and sexual intercourse from rape.[64]

However, applying consent to this range of real-world scenarios is easier said than done. Consent theory[65] on its own fails to provide useful guidelines for examining consent in medical procedures, use of land, police searches, sex—or contracts.

In order to better equip courts to apply the broad conceptual theories of consent to real-world analysis, the following Part suggests a more

61. *See* RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 26–28 (1986); SHEILA A. M. MCLEAN, AUTONOMY, CONSENT AND THE LAW 70–73 (2010); Paul B. Miller & Josephine Johnson, *Consent and Private Liability in Clinical Research, in* THE LIMITS OF CONSENT: A SOCIO-ETHICAL APPROACH TO HUMAN SUBJECT RESEARCH IN MEDICINE 42 (Oonagh Corrigan et al. eds., 2009); *see also* JESSICA W. BERG ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 132 (2d ed. 2001); Len Doyal, *Informed Consent: A Response to Recent Correspondence*, 316 BMJ 1000, 1000 (1998).

62. *See, e.g.*, United States v. Mock, 149 U.S. 273, 277 (1893).

63. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (summarizing the holding in *United States v. Drayton*, 536 U.S. 194 (2002)).

64. *See* DAVID ARCHARD, SEXUAL CONSENT 2–7 (1998); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 2–3 (1998); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 11 (Gerald Postema ed., 2003).

65. For the rich literature on consent in different disciplines, see generally JULES STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT: AN INQUIRY INTO THE LIBERAL-DEMOCRATIC THEORY OF POLITICAL OBLIGATION 23–47 (1978) (discussing political theory); THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 9 *passim* (discussing various theories involving consent); PETER W. YOUNG, THE LAW OF CONSENT 3–11 (1986) (discussing various aspects and topics involving consent); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 103, 118–19 (1981) (arguing political authority rests on consent); Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 193–98 (1986) (discussing speech act theory); Alan Wertheimer, *What is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 559–60 (2000) (focusing on sexual consent and addressing consent in other contexts); *see also* ILLUSION OF CONSENT: ENGAGING WITH CAROLE PATEMAN 102–11 (Daniel I. O'Neill et al. eds., 2008) (discussing consent in arranged marriages); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 108–304 (2004) (discussing concepts of legal consent); Beres, *supra* note 59, at 97–99 (addressing sexual consent); Monica R. Cowart, *Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes*, 23 L. & PHIL. 495, 517–18 (2004) (examining general rules that govern consent).

workable and practicable model of consent, one that is richer and broader than the narrow framing of consent courts currently use. Consent is the basis of contract law; the fact that it is often a vague and nebulous concept must not result in its being rendered practically meaningless.[66]

III. A MODEL OF CONSENT

The following Part will demonstrate, in four subparts, the ways in which consent must be understood as gradual, nuanced, and socially constructed. The first subpart rejects the binary view of consent, and in its place offers the suggestion that consent is better understood as a continuum. The second subpart fleshes out the contextual nature of consent by demonstrating that consent is often shaped by the relationships between the contracting parties, as well as by the type of contract. The third subpart suggests that consent is also shaped by public policy considerations, and the concluding subpart considers the interplay between these assertions, using the metaphor of concentric circles.

This Part does not seek to offer a singular definition of consent;[67] rather, it offers three distinct assertions regarding the nature of consent, each adding its own layer of complexity to this concept. Together, these assertions contribute to a richer, more *useful* understanding of consent than the narrow and limited notion of consent presently endorsed in contract law. The ultimate aim of the following subparts is both to enrich the understanding of consent on a theoretical level and to improve the application of consent in contract law. In other words, the following subparts hope to narrow the gap between consent in contract theory and in practice.

A. *Consent and Binary Thinking*

Contract law is dominated by binary thinking.[68] As Clare Dalton observes, contract law is shaped by dichotomies such as private–public, objective–subjective, and form–substance.[69] In her work, Dalton criticizes

66. *See generally* Lawrence Kalevitch, *Contract, Will & Social Practice*, 3 J.L. & POL'Y 379 *passim* (1995) ("This Article puts special concern on what meaningful notion of assent or consent . . . can exist in the law of contracts.").

67. *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY 331 (Peter Birks ed., 2004).

68. While binary thinking under modern contract law is not quite as rigid as it is under classical contract law, modern contract law remains based on dichotomies. For more on the difference between modern and classical contract law, see generally Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 *passim* (1990).

69. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE

this polarity, arguing that it fails to account for underlying problems of power and knowledge.[70] Moreover, there is a binary separation between contract law itself and other disciplines, such as tort law. Although doctrines such as promissory estoppel seek to bridge these two disciplines,[71] common understanding persists in its distinction between contract law and tort law.[72] The former is generally viewed as constituting consensual liability, while the latter is viewed as constituting nonconsensual liability.[73] Contract is distinguished from status,[74] though recently scholars such as Hanoch Dagan and Elizabeth Scott have argued that status and contract ought to be viewed as existing along a spectrum.[75]

Rules of interpretation and examinations of the content of the parties' agreements are also largely dichotomous. The parol evidence rule is one such example. This rule favors written documents over oral statements and formal rules over informal ones.[76] Another dichotomy found within interpretation rules is that between objective standards, which are generally

L.J. 997, 1000 (1985).

70. *Id.* at 1000–01.

71. *See* Orit Gan, *Promissory Estoppel: A Call for a More Inclusive Contract Law*, 16 J. GENDER, RACE & JUST. 47, 56–62 (2013) [hereinafter Gan, *Promissory Estoppel*].

72. Curtis Bridgeman & John C. P. Goldberg, *Do Promises Distinguish Contract from Tort?*, 45 SUFFOLK U. L. REV. 873 *passim* (2012); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 697–98; Linzer, *Uncontracts*, *supra* note 12 *passim*. For more on the intriguing connection between contract law and constitutional law, see generally Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133 *passim* (2005) (discussing discrimination and its involvement with contracts); Joseph F. Morrissey, *A Contractarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765 *passim* (2013) (analyzing the holding of *Citizens United v. Federal Election Committee*).

73. *See* Linzer, *Uncontracts*, *supra* note 12, at 141–43.

74. *See* Dante J. Scala, *Introduction to the Transaction Edition*, *in* HENRY SUMNER MAINE, ANCIENT LAW vii–ix (2002); *see also* Scala, *supra*, at 304–66. For a discussion of the status–contract continuum in the family law context, see Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293 *passim* (2015).

75. *See* Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 52–55 (Paul B. Miller & Andrew S. Gold, eds., 2016).

76. *See* Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 251, *passim* (2005).

favored, and subjective ones, which are largely disregarded.[77]

Consent is not exempt from the polar thinking of contract law: either consent existed at contract formation, or it did not; either consent was valid, or it was invalid as a result of duress, undue influence, mistake, or misrepresentation.[78] Unsurprisingly, such a dichotomous analysis yields dichotomous results: either a contract was formed, or not; either a contract is enforceable, or it is voidable or void.[79]

Other examples of binary thinking related to the concept of consent are the objective–subjective dichotomy and the private–public dichotomy. In regard to the former, consent is measured using an objective test rather than a subjective one.[80] An objective assent or manifestation of mutual agreement to contract is today considered to be the key to contract formation;[81] subjective tests of consent that concentrate on the actual will of the parties are rejected.[82] Similarly, consent is considered a private issue,

77. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 452–53 (5th ed. 2011); *see also* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833–34, 836 (1964).

78. *See* Barnett, *Contract is Not Promise*, *supra* note 12, at 655–56.

79. *See* Patterson, *supra* note 77, at 843 (stating that "if a claim is made that the contract was induced by fraud or duress and is therefore voidable" thus other evidence outside the contract is admissible).

80. For the subjective versus objective debate, see generally *Newman v. Schiff*, 778 F.2d 460, 464–65 (8th Cir. 1985) ("By the end of the nineteenth century the objective approach to the mutual assent requirement had become predominant, and courts continue to use it today."); *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 760–62, 763 (2d Cir. 1946) (Frank, J., concurring) (holding that the objective test was commonly represented in the Restatement of Contracts and in some precedent); see also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 *passim* (2000). *Compare* Wayne Barnes, *The French Subjective Theory of Contract: Separating Rhetoric from Reality*, 83 TUL. L. REV. 359 *passim* (2008) (discussing subjective theory in France), *with* Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354–58 (2007) ("Objective considerations are irrelevant.").

81. *See, e.g.*, Stevenson v. United Subcontractors, Inc., 365 F. App'x 752, 754 (9th Cir. 2009); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814–15 (7th Cir. 1987); *Newman*, 778 F.2d at 464–65; N.Y. Tr. Co. v. Island Oil & Transp. Corp., 34 F.2d 655, 655–56 (2d Cir. 1929); Ray v. William G. Eurice & Bros., 93 A.2d 272, 278 (Md. 1952); Leitner v. Braen, 143 A.2d 256, 260 (N.J. Super. Ct. App. Div. 1958); Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911); Kitzke v. Turnidge, 307 P.2d 522, 527 (Or. 1957); Wesco Realty, Inc. v. Drewry, 515 P.2d 513, 515 (Wash. Ct. App. 1973); OLIVER WENDELL HOLMES, THE COMMON LAW 242 (Mark DeWolfe Howe ed., 1963).

82. *See, e.g.*, Navair, Inc. v. IFR Americas, Inc., 519 F.3d 1131, 1138 (10th Cir. 2008);

concerning only the contracting parties' intentions, preferences, wills, and choices, and no weight is given to public or social factors.[83]

In recent years, there has been an increase in scholarly critique of this polar perception of consent.[84] For example, in her work on the subject, Chunlin Leonhard demonstrates the way in which consent falls along a complex spectrum.[85] Tom Bell also argues that consent varies by degrees.[86] Instead of the conventional binary thinking, Bell offers a spectrum on which express consent lies at one end, implied consent and hypothetical consent sit somewhere in the middle, and nonconsent and unconsent are found on the other end.[87] In this formulation, the higher the degree of consent, the more meaningful that consent is considered, and the more justifying power it has.[88] Bell labels this continuum a "graduated-consent theory."[89] Similar to Bell's work, Jennifer Drobac offers a nuanced view of an individual's capacity to give consent: capacity, according to Drobac, is not an on–off switch, but rather is variable and dependent on context and lived circumstances.[90] In this framework, capacity for consent neither begins the day one reaches the age of consent nor ends abruptly when one is diagnosed with dementia or Alzheimer's disease.[91] Rather, capacity for consent changes over time and in

Leonard v. Pepsico, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

83. *See infra* Part III.C.

84. *See, e.g.*, Ben-Shahar, *Contracts Without Consent*, *supra* note 12 *passim*; Aaron D. Twerski & Nina Farber, *Extending Comparative Fault to Apparent and Implied Consent Cases*, 82 BROOK. L. REV. 217 *passim* (2016).

85. Leonhard, *supra* note 5, at 68–70 ("These scenarios of consent present a spectrum of consent, from informed consent to increasingly problematic consent."); *see also* Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967, 1980–81 (2014); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 995 (2008).

86. Bell, *supra* note 23, at 34–43.

87. *Id.*

88. *Id.* at 43–49.

89. *Id.* at 49; *see also* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 47 (2014); Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1457 (2009) ("This Article has attempted to shift the central question of contractual consent from 'does informed consent exist?' to 'how much informed consent is efficient for the buyer to buy and the seller to sell?'").

90. Jennifer A. Drobac & Oliver R. Goodenough, *Exposing the Myth of Consent*, 12 IND. HEALTH L. REV. 471, 477 (2015).

91. *See id.*

concert with shifting circumstances.[92] Similar to capacity, there are scholars who argue that autonomy and agency—preconditions for consent—are not binary concepts.[93] For example, Kathryn Abrams suggests a sophisticated notion of partial agency.[94] For instance, this concept simultaneously acknowledges both women's oppression and the possibilities of agency under such oppression.[95]

This Article joins these scholars in critiquing the binary conceptualization of consent and in arguing that consent must be understood as a gradual and nuanced concept.[96] Moreover, this Article seeks to take Bell's insight regarding the spectrum of consent one step further. In Bell's formulation, the scales of consent are limited to express consent, implied consent, and hypothetical consent;[97] according to this Article, the spectrum of consent ranges from full-fledged consent to weak consent, with ambiguous, questionable, and ambivalent forms of consent all falling in between. Consent is not black or white; it includes a full range of gray shades.

When, however, this spectrum is not recognized, and dichotomous thinking prevails in consent analysis, the result is often one of failure and inadequacy. An example of such can be found in the doctrine of duress. Under the current doctrine, a party may assert a duress defense and claim that her consent was not freely given, but coerced.[98] If, and only if, this is proved to be the case, the contract would then be rendered voidable.[99] The failure of dichotomous thinking here stems from the fact that in some instances, consent is neither entirely freely given nor entirely coerced. A substantial middle ground exists between full consent and forced consent.[100]

92. *See id.* at 480–90.

93. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 325–26 (1995); *see also* MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS 104 (2003); Tom L. Beauchamp, *Autonomy and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 55–74 (Franklin G. Miller & Alan Wertheimer eds., 2010).

94. Abrams, *supra* note 93, at 346–48.

95. *Id.*; *see also* FRIEDMAN, *supra* note 93, at 104; Beauchamp, *supra* note 93, at 69–70.

96. For another critique of binary thinking in contract law, see Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397 *passim* (2009).

97. Bell, *supra* note 23, at 34.

98. *See* RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. LAW INST. 1981).

99. *See id.* § 174 cmt. b.

100. *See* Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 197–206 (2013) [hereinafter Gan, *Contractual Duress*].

The 2006 Appeals Court of Massachusetts case of *Biliouris v. Biliouris* illustrates this point.[101]

Biliouris featured a contract dispute over a prenuptial agreement the wife asserted she had been coerced to sign.[102] The court concluded there was no duress and the agreement was therefore valid.[103] This ruling, however, failed to take into account the woman's emotional state at the time of contracting. In fact, the facts of this case reveal the wife's consent to the prenuptial agreement was not given entirely freely: she was asked to sign the prenuptial while pregnant and with the threat that the wedding would be cancelled if she refused.[104] Distressed, the woman informed her presumptive husband and his lawyer, in tears, that she did not want to sign the agreement and indeed her lawyer had advised her not to.[105] Though this emotional distress did not amount to duress sufficient to void the contract, her signature can hardly, in light of the aforementioned context, be classified as entirely voluntary and willing.[106] This is substantial and worthy of recognition, and even if it does not rise to a level sufficient to render the contract voidable, should certainly have some legal effect on the case.[107] As a consequence of the prevailing dichotomous view of consent, however, the court had only two choices: absolute duress or no duress, and it ruled in favor of a complete enforcement of the prenuptial agreement, since absolute duress could not be proven.[108] The court's ruling in this case has grave consequences: not only does it entirely disregard the emotional stress of the woman in this case, but it also implicitly encourages such behavior by other, future husbands.[109]

As with duress, contract formation at the moment of mutual assent is not an "on-switch," but rather should reflect the gradual nature of consent leading up to the finalization of that agreement.[110] Consent is formed

101. Biliouris v. Biliouris, 852 N.E.2d 687 (Mass. App. Ct. 2006).

102. *Id.* at 689.

103. *Id.* at 693.

104. *Id.* at 689.

105. *Id.* at 689 & n.2.

106. *See id.*

107. *See* Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 690–92 (2013) ("From time to time judges refuse to ignore circumstances that are evidently stressful.").

108. *Biliouris*, 852 N.E.2d at 693.

109. *See id.* at 693.

110. *See* William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 546–47.

gradually and as a result of a process, beginning with preliminary consent and arriving, eventually, at full-fledged, robust consent.[111] It does not appear *ex nihilo* at the end of negotiations, as contract law assumes.[112] Just as consent is not shaped in one moment, neither is it static; the nature, degree, and extent of consent evolve throughout the time leading up to contract formation. As Ian Macneil argues:

> [T]he commencement and termination of transactions are both sharp in time and marked by sharp expressed consent or other clear event. This sharpness relates both to commencement and termination of the transaction itself and to participation of the individual, the two usually being coextensive. In relations, however, it is necessary to distinguish between the commencement and termination of the relation itself and the individual's participation in the relation, the two very often not being the same. Relations tend to have gradual and indistinct beginnings, and, perhaps to a lesser extent, similarly diffused endings. Individuals may enter existing relations in a similar way, but may also enter them in a highly transactional and sharp manner, and individual departures from relations may also be gradual or sharp.[113]

Omri Ben-Shahar further observes that consent occurs not once and for one moment, but rather is built through an ongoing process.[114] Ben-Shahar develops a no-retraction principle of contract formation as an alternative to the mutual assent principle, explaining:

111. *Id.*

112. *Id.* at 547.

113. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 753 (1974); *see also* Macneil, *Contracts: Adjustment of Long-Term Economic Relations*, *supra* note 46 (discussing that relational contracts are flexible and not frozen in time of formation, but include an adjustment process); Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 596–97 (1974) ("Any legal doctrine founded on both freedom of contract and the concept of total presentiation at some single temporal point, such as the acceptance of an offer, will encounter special difficulties if applied to relational contracts. The difficulties arise both from the incompleteness at any given time of the presentiation and the continuously evolving nature of that presentiation. How many thousand partial presentiations occur in a lifetime of employment with IBM? . . . As time goes by, these partial presentiations supersede earlier ones and previous aspects of the relation, and are in turn eroded and modified. It would require a multidimensional and multi-sense movie projector to present presentiation in such circumstances. Any contract law structure based on concepts of total presentiation at a particular instant in time must necessarily use a slide projector with but a single slide." (emphasis omitted)).

114. Ben-Shahar, *Contracts Without Consent*, *supra* note 12, at 1831.

> In contrast to the all-or-nothing nature of the mutual assent regime, where preliminary forms of consent are either full-blown contracts or create no obligation, under the no-retraction regime, obligations emerge gradually, as the positions of the negotiating parties draw closer. Further, the no-retraction liability regime can be coupled with different damage measures to advance various social goals, including optimal reliance.[115]

While this Article concurs with Ben-Shahar's description of the formation of contract as a gradual process, it would further note that consent itself is gradual. Rather than using a substitute for consent to reflect this spectrum (such as the no-retraction liability regime), this Article holds that consent itself—as well as the resulting remedies—can and should be viewed as nonbinary. Ben-Shahar's idea of a "sliding scale of enforceability"[116] can be achieved by adopting a continuum notion of consent.

Ceasing to view consent in paradigms of black and white will enable both more nuanced analyses of difficult consent cases and more flexible remedies.[117] Consider, for example, consent in cases of promissory estoppel. Promissory estoppel is aimed at enforcing promises that are not bargained for but are reasonably relied upon.[118] In other words, promissory estoppel deals with cases in which no contract was actually formed, as no mutual moment of assent occurred between the parties.[119] In these cases, unlike other cases regarding consent, courts must transcend a dichotomous perspective of consent—and of contract—in order to impose a post hoc legal obligation on the promisor and defend the reasonable reliance of the promisee on the promisor's word.[120]

Acknowledgement of varying degrees of consent allows courts to impose flexible remedies: in cases of promissory estoppel, courts have the

115. *Id.* at 1835–36; *see also* Omri Ben-Shahar, *"Agreeing* to *Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389 *passim* [hereinafter Ben-Shahar, *Agreeing to Disagree*]. *But see* Ronald J. Mann, *Contract—Only with Consent*, 152 U. PA. L. REV. 1873 *passim* (2004).

116. Ben-Shahar, *Contracts Without Consent*, *supra* note 12, at 1836.

117. *See id.* at 1836–37, 1847.

118. *See* Steven W. Feldman, *Autonomy and Accountability in the Law of Contracts: A Response to Professor Shiffrin*, 58 DRAKE L. REV. 177, 190–91 (2009) [hereinafter Feldman, *Autonomy and Accountability*] (citing BLACK'S LAW DICTIONARY 591 (8th ed. 2004)).

119. *See id.* at 190–92.

120. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

freedom to impose reliance damages[121] rather than expectation damages,[122] which are often higher.[123] This flexibility allows for the recognition that some remedy is required, while simultaneously accounting for the absence of mutual consent, thus providing a remedy that may be less than that afforded in a typical contract breach, but that is also far more substantial than a nonremedy, as in the case of *Biliouris*.[124] As soon as consent is recognized as a continuous process, different degrees of consent may result in different measures of damages. Promissory estoppel is regarded by some scholars as an insignificant doctrine and as a tort (rather than a contract) liability.[125] However, other scholars have argued promissory estoppel should be regarded as an important contract law doctrine, in that it provides a flexible remedy in cases of a non-bargained-for promise.[126] As Ben-Shahar argues, flexible damages better reflect the gradual nature of contract formation, as they enable the court to accommodate parties who gave "partial" or qualified consent.[127] This Article concurs that this solution is superior to an all-or-nothing view of consent and remedy.[128] However, this Article suggests that this formula of flexible damages would be even more meaningful and significant when utilized under a nonbinary consent rule, rather than under a no-retraction rule.

Partial enforcement of the contract—i.e., enforcing only some terms but not others—is another example of a flexible remedy that better accommodates a spectrum of contractual consent. Section 211 of the Restatement (Second) of Contracts distinguishes between nonnegotiated and even unknown or unread terms in a standard form agreement, on the one hand, and unknown terms that are beyond the reasonable expectations of the nondrafting party on the other.[129] The former are held to be

121. Reliance damages restore promisees to their position prior to their reliance on the promise given. Feldman, *Autonomy and Accountability*, *supra* note 118, at 191 n.56.

122. Expectation damages put promisees in the position they would have been in had the promise been performed. *Id.*

123. *See id.*; *see also* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275–77 (Wis. 1965).

124. *See supra* notes 102–06 and accompanying text.

125. *See, e.g.*, Feldman, *Autonomy and Accountability*, *supra* note 118, at 191 n.56.

126. *See, e.g.*, Gan, *Promissory Estoppel*, *supra* note 71, at 55–56.

127. Ben-Shahar, *Agreeing to Disagree*, *supra* note 115, at 428.

128. *Cf.* Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 *passim* (1982) (discussing flexible remedies in impracticability cases).

129. RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In*

enforceable, while the latter are not, and when a contract contains both, courts will selectively enforce the standard terms while declining to enforce unreasonable terms.[130] By rejecting a binary formulation—which would advocate either enforcing the contract in full or not enforcing it at all—this approach accommodates the varying degrees of consent observed within a single contract. Like reliance damages, partial enforceability reflects a flexible remedy that is properly tailored to accommodate the continuum of consent. Unfortunately, courts rarely use this section.[131]

In a similar vein, Nancy Kim suggests requiring that consumers accept certain terms in cases of wrap contracts.[132] In Kim's formulation, rather than consenting to the contract in its entirety by clicking the "I Agree" button, the consumer will give two kinds of assent: the first specific and the second presumed.[133] Regarding the specific forms of assent, Kim suggests that some terms should require that consumers provide more meaningful consent than a click of an I Agree button.[134] This Article holds that doing so would not only strengthen consumer consent to wrap contracts, as Kim suggests, but would also acknowledge the different degrees of consent and would imbue into this section of contract law a greater recognition of the different types. Consent is not all or nothing, and contract law should recognize different types and degrees of consent.[135]

One may argue that recognizing gray areas of consent will result in unstable contract formation law. However, time will yield a robust body of

Defense of Restatement Subsection 211(3), 82 WASH. L. REV. 227, 249 (2007) [hereinafter Barnes, *Toward a Fairer Model*].

130. *See* Barnes, *Toward a Fairer Model*, *supra* note 129, at 248–49.

131. Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 736 (2016).

132. KIM, *supra* note 31, at 54–62; *see* Nancy S. Kim, *Boilerplate and Consent*, 17 GREEN BAG 2D 293, 304–06 (2014) [hereinafter Kim, *Boilerplate and Consent*]; Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 810–14 (2007).

133. *See* KIM, *supra* note 31, at 195–97; Kim, *Boilerplate and Consent*, *supra* note 132, at 305 ("A specific assent requirement increases salience while a presumed assent requirement acknowledges that not all terms require consent.").

134. *See* KIM, *supra* note 31, at 196–97 (providing an example of a contract in which the user would assent to specific terms).

135. *See* Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469 *passim* (2008) (distinguishing between general assent to a standard form contract and knowing assent to a specific, unbargained term in the standard form contract).

case law that will be sufficient to provide the courts with meaningful guidelines when exercising their discretion. Furthermore, this case law will give contracting parties ex ante clarity on consent requirements and a set of predictable remedies in their absence. Most importantly, the spectrum view of consent reflects a more realistic view of consent's actual nature as a complex, dynamic, and subtle concept that cannot and must not be confined to binary characterization.[136]

B. *Consent in Context*

Contract law is inarguably contextual.[137] Indeed, courts often consider context in their interpretation of contracts[138] and take into account the circumstances in which the contract was formed,[139] as well as course of performance, course of dealing, and usage of trade.[140] This Article argues that consent must be seen as a context-dependent concept, not only

136. *See* Leonhard, *supra* note 5, at 69.

137. *See* Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749, 749–50 (2010); *see also* Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549 *passim* (2010); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 794–97 (1991).

138. *See, e.g.*, Stanford Ranch, Inc. v. Md. Cas. Co., 89 F.3d 618, 626 (9th Cir. 1996); Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170–72 (N.Y. 2002); Estate of Johnson v. Carr, 706 S.W.2d 388, 390–91 (Ark. 1986); Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643–45 (Cal. 1968).

139. *See, e.g.*, *Pac. Gas & Elec. Co.*, 442 P.2d at 644–45. *But see* Fed. Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 622 (7th Cir. 1989); Trident Ctr. v. Conn. Gen. Life Ins. Co., 847 F.2d 564, 569–70 (9th Cir. 1988) (criticizing a California decision holding that extrinsic evidence must be considered when the parties disagree about the contract's intended meaning); *Greenfield*, 780 N.E.2d at 170 ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.").

140. U.S. Naval Inst. v. Charter Commc'ns, Inc., 875 F.2d 1044, 1048–49 (2d Cir. 1989); Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 780 (9th Cir. 1981); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 8 n.4 (4th Cir. 1971); The T.J. Hooper v. N. Barge Corp., 60 F.2d 737, 740 (2d Cir. 1932); Emp't Television Enters. v. Barocas, 100 P.3d 37, 43 (Colo. App. 2004); Stewart v. Brennan, 748 P.2d 816, 821 (Haw. Ct. App. 1988); Bischoff v. Quong-Watkins Props., 748 P.2d 410, 413 (Idaho Ct. App. 1987) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 203, 204 (AM. LAW INST. 1981)); Hurst v. W. J. Lake & Co., 16 P.2d 627, 628 (Or. 1932); Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001) (citing RESTATEMENT (SECOND) OF CONTRACTS § 220 cmt. d)); U.C.C. § 1-205(2) (1989); RESTATEMENT (SECOND) OF CONTRACTS § 220(1).

sporadically, but consistently. Consider, for example, the difference between consenting to marry, on one hand, and consenting to the terms of a shrinkwrap contract by downloading and opening a software update, on the other. Accordingly, questions of whether consent has been freely given, the scope of that consent, and the capacity to consent must be viewed in the context of the parties' choices, preferences, and interests,[141] the relationships and histories between the contracting parties, and the type of contract and terms therein. Consent might amount to a quick, simple choice between a few options, or it might follow a lengthy and difficult decision-making process involving personal and conflicting considerations. Consent can be oral, such as a stated agreement, or behavioral, such as the click of a mouse or signature on a document.[142] Consent can be a singular, one-time event to a discrete contract, or an ongoing process in a long-term relational contract.[143] Consent may take place between two equals or in relations of imbalanced power; under conditions of trust between intimates or distrust between strangers. Consent can be static or it can be evolving; it can be given under conditions of distress and hardship or under conditions of privilege and prosperity.

Yet much of the relevant scholarship and case law disregards context altogether when evaluating consent. For example, Brian Bix addresses consent in general, and does not address consent to different types of contracts.[144] Other scholars focus only on specific contracts, such as contracts of adhesion.[145] Chunlin Leonhard criticizes consent as a flawed paradigm and suggests an alternative test to consent, namely, the totality of circumstances.[146] Such a test, in Leonhard's formulation, would allow for flexibility in examining "multiple factors surrounding the entire transaction."[147] However, this Article demonstrates that one need not go as far as Leonhard, looking outside of the realm of consent for context: Consent itself is contextual.

This subpart offers a counterargument to much of the existing

141. *See, e.g.*, Alain Marciano & Giovanni B. Ramello, *Consent, Choice, and Guido Calabresi's Heterodox Economic Analysis of Law*, 77 L. & CONTEMP. PROBS. 97, 101–04 (2014).

142. *See* KIM, *supra* note 31, at 2–3.

143. *See* Whitford, *supra* note 110, at 546.

144. Bix, *supra* note 9, at 251–67.

145. *See infra* notes 231–36 and accompanying text.

146. Leonhard, *supra* note 5, at 86.

147. *Id.* at 85–86.

scholarship by demonstrating that consent differs depending on contractual relations. Focusing on three examples—spousal agreements, employment agreements, and standard form contracts—this subpart demonstrates that consent varies drastically across these contract types, as it takes forms more or less formal, rational, emotional, and relational.[148]

While courts tend to view consent to these three contract types as essentially identical—in other words, holding that "consent is consent"—this Article suggests that spousal agreements, which are fundamentally relational,[149] and standard form contracts, which are fundamentally economic, represent two extremes on the consent spectrum,[150] with employment agreements occupying a middle ground between the two (as both relational and business elements enter into the context of employment).[151] Certainly there are cases in which spousal relationships may be influenced by economic factors and standard form contracts by relational components; even in such cases, though, the nature of these contracts is significantly and fundamentally different. The three agreement types differ so greatly in part because of different types of power relations embedded within each: between men and women[152] in the case of opposite-sex marriage;[153] between employers and employees;[154] and between consumers and corporations.[155] The relations between the parties change the context under which consent is given, and accordingly change the nature of that consent. While legislation and regulation obviously vary widely in these three areas—marriage, employment, and consumer protection[156]—this

148. *See* Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1258–61, 1263 (1998) (advocating for a rational choice theory that accounts for emotion, relation, and context).

149. *See* discussion *infra* Part III.B.1.

150. *See* discussion *infra* Part III.B.3.

151. *See* discussion *infra* Part III.B.2.

152. For reasons of simplicity, this Article considers only male–female marriage, and does not consider same-sex marriage. This choice is the result of space limitation, and absolutely does not reflect a position which holds same-sex marriages to be less valid.

153. Gan, *Contractual Duress*, *supra* note 100, at 174–75.

154. Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J. 1, 1 (1986).

155. Vera Bolgar, *The Contract of Adhesion: A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53, 55–56 (1972); Tal Kastner, *How 'Bout Them Apples?: The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67, 69 (2014).

156. *See* Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer*

Article argues that contract law consent requirements should themselves be context dependent, notwithstanding specific legislation and regulation.[157]

1. *Spousal Agreements*

Judicial analysis of consent is typically acontextual. Consider the 1919 case of *Balfour v. Balfour*,[158] in which the King Bench court refused to enforce an agreement between Mr. Balfour and Mrs. Balfour, under which—according to Mrs. Balfour—her husband made an enforceable promise to pay her a monthly allowance.[159] The court based its conclusion on the lack of consideration given by Mrs. Balfour in the alleged agreement, and on the grounds that such a contract was against public policy.[160] However, the court also concluded there was no consent sufficient to form a legally binding contract between the spouses, reasoning that agreements between husband and wife "are not contracts because the parties did not intend that they should be attended by legal consequences,"[161] and adding, "These two people never intended to make a bargain which could be enforced in law."[162]

The court considered, of course, that the parties were husband and wife and not strangers—but only with regard to the issue of consideration.[163] The same promise might have constituted a contract in the business context, the court reasoned, but did not constitute one in the context of marriage.[164] In so ruling, the court failed to extend its recognition of the relevance of context

Protection Statutes, 26 HOUS. L. REV. 575, 582–83 (1989).

157. For more on the diverse meaning of contract, see HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 2–3 (2017). For a pluralistic theory of contract law, see Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 L. & CONTEMP. PROBS. 19 *passim* (2013); Roy Kreitner*, On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 *passim* (2012). For a pluralistic theory of family law, see Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 *passim* (2016); Shahar Lifshitz, *The Pluralistic Vision of Marriage*, *in* MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 260–80 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

158. Balfour v. Balfour, 2 K.B. 571, 571 (1919).

159. *Id.* at 579.

160. *See id.* at 578–79.

161. *Id.* at 579.

162. *Id.* at 575.

163. *See id.* at 578–79.

164. *See id.* ("Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses.").

to the issue of consent.[165]

A similar judgment was made in the more recent case of *Borelli v. Brusseau*. In this case, Mrs. Borelli claimed that she agreed to provide caring services to her sick husband in return for his promise to leave her a certain portion of his property.[166] Yet, after performing her part of the bargain—by taking care of him until his death—Mr. Borelli left most of his property to his daughter, allegedly in violation of their agreement.[167] Mrs. Borelli sued for breach of contract.[168] As in the *Balfour* case, the *Borelli* court rejected the claim due to lack of consideration and for public policy reasons.[169] The majority believed the wife's services to her husband were in accordance with the promises made in her marriage vows; therefore, they did not constitute new consideration sufficient for the creation of a binding agreement with respect to the husband's property disposition.[170] The dissent, however, viewed her services as going above and beyond her marital duties and therefore constituting new consideration.[171] In this sense, the marriage context was a highly relevant issue in the determination of the presence or absence of consideration.

This Article argues that the context of marriage should shape not only the court's consideration analysis in the case, but also its consent analysis. In *Borelli*, both the dissent and the majority narrowly viewed the issue of consent as divorced from the context of the marriage and the agreement in question—despite the majority's acknowledgement, in the opinion's opening sentence, that "[i]t is fundamental that a marriage contract differs

165. *See, e.g.*, *id.*; HILA KEREN, CONTRACT LAW FROM A FEMINIST PERSPECTIVE 90–91 (2004).

166. Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 17–18 (Ct. App. 1993).

167. *Id.* at 18.

168. *Id.* at 17.

169. *Id.* at 19.

170. *See id.* at 20.

171. *Id.* at 20 ("The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them."). *Id.* at 24 ("Had there been no marriage and had they been total strangers, there is no doubt Mr. Borelli could have validly contracted to receive her services in exchange for certain of his property. The mere existence of a marriage certificate should not deprive competent adults of the 'utmost freedom of contract' they would otherwise possess.").

from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation."[172] Although unrecognized by the court, consent in the *Borelli* case was made in the context of intimate relations.[173] It was oral and ongoing (consider that the wife nursed her husband over the course of several months), and it was given informally under conditions of love, devotion, and care.[174]

Judicial analysis of consent in spousal agreements remains acontextual today, even as the judicial view of marriage has evolved to accommodate legally binding spousal contracting. For example, in the 1990 case *Simeone v. Simeone*, the Supreme Court of Pennsylvania applied general contract law principles in its decision to uphold a prenuptial agreement.[175] With that, the court did not consider that contextual factors may require special accommodation.[176] Specifically, the court rejected the argument that the prenuptial agreement was void since the wife-to-be did not consult independent legal counsel,[177] as well as the claim that the court should review the reasonableness of the prenuptial before affirming its validity.[178] According to the court's ruling, disclosure requirements for prenuptial agreements are the same as those for any other contract, with no special consideration given to the contextual factors that might make prenuptials categorically different from other contracts.[179]

In its ruling, the court indeed treated prenuptials as though they were any other contract.[180] In so doing, it entirely disregarded context: the parties involved and their relationship, the specific subject matter of the contract, the timing of contract formation, and its enforcement.[181] The court failed to reckon with the fact that context can severely affect the validity of consent.[182]

The dissent also disregarded the issue of consent.[183] While it disagreed

172. *Id.* at 18.
173. *See id.*
174. *See id.* at 17–18.
175. Simeone v. Simeone, 581 A.2d 162, 166, 168 (Pa. 1990).
176. *Id.* at 166.
177. *Id.*
178. *Id.*
179. *Id.* at 167.
180. *Id.* at 166.
181. *See id.*
182. Courts in different states take different approaches to the review of prenuptial agreements. *See* Aloni, *supra* note 157, at 333–34.
183. *Simeone*, 581 A.2d at 168–72 (McDermott, J., dissenting) (lacking an analysis of

with the majority's refusal to examine the terms of the agreement—justifying such a review on the basis of public policy considerations—its contextual analysis was applied to the terms and enforceability of the prenuptial, not to the bride's consent.[184] The contextual analysis need not have been so limited in this case; instead, it should have been applied to the review of the consensual formation of the prenuptials as well.[185]

Similarly, courts considering formation defenses, such as duress, should pay attention to context. In *Biliouris*, the court rejected the wife's claim of duress based on the parties' behavior before and during the formation of the prenuptial agreement.[186] The court explained that the wife had sufficient time to review the prenuptial agreement and consult a lawyer, and she told the notary she had signed the agreement freely.[187] The court also stated that the bride's pregnancy and the groom's threat to cancel the wedding absent her signing had indeed presented her with a difficult choice, but did not constitute duress.[188] Thus, the court focused on the parties' actions and statements and disregarded the context of marriage.[189] The court examined only the factors it deemed relevant to any contract, such as the opportunity to consult a lawyer and the declaration of consent before a notary.[190] In doing so, the court gave little to no weight to specific factors relating to the prenuptial agreement, such as her pregnancy and the specific threat of cancelling the wedding.[191] The court ultimately considered these contextual factors to be virtually irrelevant to the wife's consent to the prenuptial.[192]

Similarly, in *Askew v. Askew*, the Supreme Court of Mississippi stated that normal stress and emotional suffering associated with divorce proceedings is not sufficient to constitute duress.[193] The court gave little

consent).

184. *Id.* at 169.

185. *See, e.g.*, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 258 (1995).

186. Biliouris v. Biliouris, 852 N.E.2d 687, 692–93 (Mass. App. Ct. 2006).

187. *Id.* at 693.

188. *Id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.* For an analysis on duress see, e.g., KEREN, *supra* note 165, at 186–209.

193. Askew v. Askew, 699 So. 2d 515, 518 (Miss. 1997); *see also* Lewis v. Lewis, 387 So. 2d 1206, 1210 (La. Ct. App. 1980) (holding that a wife who was more concerned about money than violent threats was not under duress due to the violent threats).

consideration to how a grave, emotional, and sensitive decision such as divorce might influence a person's assent.[194]

Consent to spousal agreements is a unique form of consent with unique dimensions. As *Balfour* demonstrates, consent may be oral and informal.[195] Even when parties sign a written contract drafted by a lawyer—as was the case in *Biliouris* and *Simone*—consent is not held to be as formal as in a business context.[196] Though businesspersons, too, can contract informally and orally, the handshake closing a deal is different than an understanding reached between intimate partners.[197] Importantly, trust, history, and a host of other factors exist between the contracting parties and affect the consent given.[198] While close relationships and the trust that goes with them might very well exist between contracting businesspersons, friendly business relationships presumably lack the intimacy and closeness shared between spouses, and thus do not affect consent to the same degree.[199] Further, while spousal agreements may contain economic considerations and hold economic consequences, their emotional character sets them apart from other types of contracts.[200] Other contracts might concern significant and long-term relationships, but marital relationships and spousal agreements remain unique.

Factors such as power differences may come into play between spouses in a way they would not between business partners.[201] Such power differences may very well lead to spouses contracting on unequal footing, and this should be considered by the courts. Furthermore, and as *Borelli* demonstrates, consent in a marriage is not static or frozen at the time of contract formation, but is rather a continuously occurring process.[202] Accordingly, the nature and scope of consent given by each partner evolves throughout the marriage. The courts must take these contextual factors into

194. *Askew*, 699 So. 2d at 518.

195. *See* Balfour v. Balfour, 2 K.B. 571, 578–80 (1919).

196. *See Biliouris*, 852 N.E.2d at 689; Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990).

197. *See Balfour*, 2 K.B. at 578.

198. *See Simeone*, 581 A.2d at 166.

199. *See Balfour*, 2 K.B. at 578.

200. *See, e.g.*, Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 922–25 (2000).

201. *See, e.g.*, *id.* at 928 (discussing the imbalance in contractual position of a wife in a disposition agreement versus her husband).

202. *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 18 (Ct. App. 1993).

account when analyzing spousal agreements, rather than simply applying general, often insufficiently nuanced, contract law rules.

2. *Employment Agreements*

As in the case of consent to spousal agreements, judicial analysis of consent to employment agreements is also typically acontextual. Consider the classic contract case of *Embry v. Hargadine, McKittrick Dry Goods Co.*, which revolved around an alleged oral contract between Embry and his employer.[203] In this case, Embry's employment agreement was set to expire at the end of the year, so Embry inquired in December as to whether he could expect to renew his contract.[204] His employer answered, "Go ahead, you're all right. Get your men out, and don't let that worry you."[205] Embry understood this to mean he would continue working into the following year. [206] When Embry's employer later declined to extend Embry's employment, Embry filed suit for breach of contract.[207] The employer denied the verbal affirmation formed an informal employment contract. [208] However, the court held that a contract was indeed formed by the employer's oral affirmation, reasoning: "We think no reasonable man would construe that answer to Embry's demand that he be employed for another year, otherwise than as an assent to the demand, and that Embry had the right to rely on it as an assent."[209] In this ruling, the court employed general contract law formation rules and neglected to address the specifics of the employment relations in the case. [210] In other words, the court gauged consent using an objective rather than subjective test.[211] In so doing, the court largely disregarded the dependency of the employee on his employer, the reality of working on a yearly contract, and the general power imbalance between the parties.[212] Questions regarding previous dealings between the parties such as when Embry's employment began, what was discussed in

203. Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 777–78 (Mo. Ct. App. 1907).
204. *Id.* at 777.
205. *Id.*
206. *Id.*
207. *Id.* at 778.
208. *Id.* at 777–78.
209. *Id.* at 779.
210. *See id.* at 778–80.
211. *See id.*
212. *See id.*

previous conversations between Embry and his employer, how and when the employment agreement was extended in previous years, and more, were not discussed at all.[213] Answers to such questions could have helped in interpreting and analyzing the conversation between Embry and his employer on a deeper level. While the court, in this case, ended up ruling in favor of the employee, it did so on the basis of an interpretation of the employer's statement that was divorced from the broader context[214] and thus failed to set a meaningful precedent for other, future workers found in similar scenarios.

Indeed, in the 1980 case of *United Steel Workers of America v. United States Steel Corp.* heard before the U.S. District Court for the Northern District of Ohio, the court's acontextual ruling failed to protect the employees.[215] Like *Embry*, this case revolved around a question about the enforceability of promises made regarding continued employment.[216] In this case, steelworkers sued to enforce their employer's promises to keep certain plants open for as long as they remained profitable.[217] In response, the court framed the question as follows: "[W]ere the statements offers to enter into a unilateral contract that were binding on the corporation? and, should the company reasonably have expected the workers to rely on those statements?"[218] The court answered both of these questions in the negative.[219]

In doing so, the court disregarded the context of long-term employment relationships. In its opinion, the court gave a short history of the steel industry,[220] but this description served only as background for the employer's decision to close the plant, and was not held as relevant for the court's analysis of the breach of contract claim.[221] The court saw the decision

213. *See id.* at 779–80 (failing to reference any previous dealings between the parties).

214. *See id.*

215. *See* United Steel Workers of Am. v. U.S. Steel Corp., 492 F. Supp. 1, 11 (N.D. Ohio), *aff'd in part and vacated in part*, 631 F.2d 1264 (6th Cir. 1980).

216. *Compare id*. at 2–3 (stating that the plaintiffs' complaint alleged the company promised to keep the mills open if the workers kept the mills profitable), *with Embry*, 105 S.W. at 777 (discussing the dispute between appellant and respondent regarding a contract for re-employment).

217. *United Steel Workers of Am.*, 492 F. Supp. at 4.

218. *Id.* at 5.

219. *Id.* at 6.

220. *Id.* at 3–4.

221. *See id.* at 4 (analyzing the breach of contract claim by solely considering the

to close the plant as a cut-and-dry business decision based on economic considerations.[222] However, the relations between the employees and employer, between the employees themselves, between the employees and their union, between the employer and the union, as well as the plant's position in the town's community are all important factors in terms of genuinely understanding and interpreting the communications between the employer and employees.[223] In ignoring these factors, the court failed to engage with the case in its full contextual actuality.

Employment agreements, like spousal agreements, have unique features. Employee consent is often influenced by the power relations between employee and employer.[224] Furthermore, ongoing employment contracts may be semiformal—involving informal arrangements and understandings in the workplace—in addition to formal written contracts. Long-term work relationships, like those in the case of *United Steel Workers of America*,[225] may also play a role. Employment agreements may thus be viewed as the middle point on the spectrum between highly intimate, highly contextual spousal agreements at one extreme and entirely impersonal standard form contracts at the other. In other words, employment agreements ought to be regarded as less emotional and relational than spousal agreements, but still not as formalistic and discrete as standard form contracts, which will be discussed in the following subpart.

3. *Standard Form Contracts*

This subpart explores standard form contracts, or contracts that are drafted by one party and presented to the other party as a take-it-or-leave-it offer. Scholars have attempted to use a variety of consent theories in order to justify the validity of consent to standard form contracts.[226] Karl

communications between the employer and employees).

222. *See id.* at 6.

223. *Cf.*, *e.g.*, Panhandle E. Pipe Line Co. v. Smith, 637 P.2d 1020, 1025 (Wyo. 1981) (discussing the average period of seniority for other employees in the company and comparing it to the plaintiff's goal to stay until he retired, which was relevant to the calculation of damages for the breach of contract).

224. For a discussion of consent to employment agreements, see Lisa J. Bernt, *Tailoring a Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31 *passim* (2012); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 *passim* (1996).

225. *United Steel Workers of Am.*, 492 F. Supp. at 9–10 (discussing the long-term relationship between the community and steel industry).

226. For a summary of the dominant literature on standard form contracts, see

Llewellyn, for example, argues that while consumers should be expected to give express assent to negotiated terms, blanket consent is sufficient regarding reasonable standard terms consumers have had appropriate opportunity to review.[227] Barnett, discussed above, suggests a simple, objective interpretation of consent, namely, the manifested intention to be legally bound.[228] For these scholars, consent to standard form contracts is unproblematic.

While consent to standard form contracts is obviously significantly different than the forms of consent examined thus far in this Article, it is still problematic in itself, particularly in light of empirical studies that have shown consumers do not read the contracts they sign or are otherwise deemed to accept.[229] That consumers are deemed to have consented to an agreement without having read it or understanding the terms to which they have consented raises serious concerns regarding consumer autonomy and agency.[230] Indeed, the consent given by consumers to boilerplate contracts is often more fictitious than actual.[231] Although special doctrines concerning contracts of adhesion help to differentiate these contracts from negotiated contracts,[232] these agreements are still largely governed by a general body of

Warkentine, *supra* note 135, at 484–505; *see also* Margaret Jane Radin, *Boilerplate Today*: The *Rise of Modularity and* the *Waning of Consent*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 189–90 (Omri Ben-Shahar ed., 2007) [hereinafter Radin, *Boilerplate Today*].

227. Karl N. Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

228. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 627 (2002); *see also* Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 842 (2010) ("[A]ssenting to unknown forms in standard form contracts is legitimate and bears significant similarities to voting for a political candidate to office in a representative democratic assembly."); Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price*, 84 UMKC L. REV. 1, 2 (2015) ("[C]onsent to form contracts should be construed as consent to pay market price . . . .").

229. *See supra* note 33 and accompanying text.

230. *See, e.g.*, Radin, *Boilerplate Today*, *supra* note 226, at 197–98.

231. *See* Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87, 90 (2012) ("When subjects saw and actively selected the term obligating them to perform the undesirable task, they were significantly more likely to perform that task than when they had no such choice and when there was no contract at all. . . . [M]ore active engagement in the preconsent phase yields increased compliance.").

232. *See, e.g.*, Ben-Shahar, *Contracts Without Consent*, *supra* note 12 *passim*; *see generally* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981)

contract law that is insufficiently tailored to their particularities.

Some scholars have already confronted the problems inherent in the courts' analyses of consent to boilerplate contracts as though they were negotiated agreements and have pushed for modifications to boilerplate contracts that require more robust consent from consumers.[233] For example, such modifications might include requiring that companies draft boilerplates more clearly and in terms easier for laypersons to understand,[234] ensuring that customers click an I Agree button or sign off on specific terms rather than give a blanket signature at the end of the contract,[235] or including warnings encouraging customers to read the terms to which they assent.[236] Scholars have also suggested a more robust judicial policing of the reasonableness of contract terms under the doctrines of unconscionability and regulations; others have suggested scrapping consent altogether as a requirement for boilerplate contracts and instead relying on noncontract law, such as tort law and consumer protection regulatory law, to ensure consumer protection.[237]

Courts reviewing the enforceability of standard form contracts are typically satisfied by the presence of default consent following notice and an opportunity to object.[238] The following cases demonstrate how such an approach insufficiently protects consumers and the ways in which consent to standard form agreements is problematic.[239]

(outlining the suggested rules for standardized agreements).

233. *See, e.g.*, KIM, *supra* note 31, at 48, 208; Robert A. Hillman, *Foreword*, 44 SW. L. REV. 209, 211–12 (2014).

234. *See* KIM, *supra* note 31, at 179.

235. Hillman, *supra* note 233, at 212.

236. KIM, *supra* note 31, at 90–91.

237. *See, e.g.*, RADIN, BOILERPLATE, *supra* note 38, 16–17, 212–13 (discussing that state law is being superseded by the law of the firm); Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 364 ("Such deceptive boilerplate could be assimilated to torts protecting persons from fraud and deception."). *But see* Feldman, *Mutual Assent*, *supra* note 12, at 429–34 (stating that Radin does not appropriately take the freedom of contract into account); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970) (proposing that standard form contracts are properly categorized as products or things); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 532 (1971) ("It would be unrealistic to try to make the law of contract fair and legitimate by insisting that a standard form, to be enforceable, must be an uncoerced, informed agreement.").

238. *See* Margaret Jane Radin, *Taking Notice Seriously: Information Delivery and Consumer Contract Formation*, 17 THEORETICAL INQUIRIES L. 515 *passim* (2016).

239. *See* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99

The standard form contract in *Specht v. Netscape Communications Corp.*[240] was a software license agreement that appeared on the webpage of Netscape before consumers downloaded available Netscape software.[241] In the process of downloading and installing the software, consumers "were automatically shown a scrollable text of [the] program's license agreement and were not permitted to complete the installation until they had clicked on a 'Yes' button to indicate that they accepted all the license terms."[242] In the course of its analysis of this case, the court observed that a party can indeed agree to provisions she is unaware of.[243] However, in this specific case, the consumer did not have sufficient notice about the arbitration clause in Netscape's license,[244] and as such the court held that the consumer's purported assent, i.e., clicking on the download button, did not in fact constitute assent to the license agreement.[245] Thus, a consumer can consent to contractual provisions she is unaware of just because she had sufficient notice of these provisions.[246]

In a related case, *Hill v. Gateway 2000, Inc.*, the Hill family ordered and paid for a computer over the phone.[247] The computer came with a list of terms that purported to govern the sale unless the computer was returned within 30 days.[248] The Hills did not return the computer within the given period, and the question in this case was whether these terms, and in particular an arbitration clause, were part of the contract between the parties.[249] The court answered this question in the affirmative, reasoning that the Hills had the opportunity to read the terms and to reject them by

IOWA L. REV. 1745 *passim* (2014) (discussing the psychology of and other aspects behind standard form agreement consent).

240. Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 20 (2d Cir. 2002).

241. *Id.* at 20–21.

242. *Id.* at 22.

243. *See id.* at 32.

244. *Id.* ("We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.").

245. *Id.* at 29–30 ("[A] consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms . . . .").

246. *See id.* at 29–32.

247. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997).

248. *Id.*

249. *Id.*

returning the computer within 30 days if they so desired.[250] The Hills were found to have assented to terms they did not read, simply because they had had the opportunity to read them.[251] As such, consent has little meaning.

ProCD, Inc. v. Zeidenberg featured a classic shrinkwrap contract.[252] In this case, Zeidenberg bought a consumer package of software and ignored the shrinkwrap license in the package that restricted its use to noncommercial purposes.[253] The court upheld the terms of the shrinkwrap license, reasoning they were an agreed-upon part of the contract between the parties.[254] According to the court, this contract was formed by way of a "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable."[255] It found the form contract to be similar to those involved in the purchase of insurance or airline tickets.[256]

In the 1991 case of *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court enforced the terms of a cruise ticket containing a forum selection clause.[257] The majority rejected the idea that "a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[258] The dissent, notably, based its conclusion on the fact that the ticket purchasers had not legally assented to the forum selection clause.[259] It noted that "only the most meticulous passenger is likely to become aware of the forum-selection provision" and observed that passengers did not have an opportunity to read the forum

250. *Id.* ("[T]erms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product." (citing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996))).

251. *See id.* at 1149.

252. *ProCD, Inc.*, 86 F.3d at 1449 ("The 'shrinkwrap license' gets its name from the fact that retail software packages are covered in plastic or cellophane 'shrinkwrap,' and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package.").

253. *Id.* at 1450.

254. *Id.* at 1452.

255. *Id.* at 1451.

256. *Id.*

257. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596–97 (1991) *superseded by statute*, 46 U.S.C. § 30509 (2012).

258. *Id.* at 593.

259. *Id.* at 598–99 (Stevens, J., dissenting) (citing The Kensington, 183 U.S. 263, 268 (1902)).

selection clause at all until after they had purchased their tickets.[260]

As these cases demonstrate, consent to standard form contracts is highly problematic—and often fictitious. Unlike in spousal agreements (or employment agreements, for that matter), consent in standard form contracts is not relational and ongoing, but is rather a one-time, static assent to a contract. Though one may use a computer or an application for many years, the contract of adhesion governing the relevant purchase is discrete and formal. The power imbalance between the parties inherent in such contracts render consent an empty, meaningless concept. Unlike spousal agreements and employment agreements, standard form contracts are formed without any reasonable assumption that the consumer will have read or understood the terms, and without the consumer having any ability to negotiate terms.[261] Further, in these contracts, consent is behavioral—provided through the signing of a form or the click of a mouse—and there are no supplementary oral understandings.[262] Consent given in the business or consumer context is different from consent given in the context of marriage or employment context. Thus, courts should take these unique features of consent into account in order to protect consumers. However, as demonstrated above, courts use notice and opportunity to read as measures of consent and apply general contract law rules.

C. *Consent and Public Policy*

While consent addresses the parties' will and is vital to the process of contract formation, public policy is utilized in the process of contract enforcement. Societal values, interests, and principles can each override consensual agreements between parties.[263]

This Article seeks to explore the complex relationship between consent and public policy,[264] and to suggest that courts must take public policy into

260. *Id.* at 597.

261. *See, e.g.*, *id.* at 587–88 (majority opinion); *ProCD, Inc.*, 86 F.3d at 1450.

262. *See, e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 20 (2d Cir. 2002).

263. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

264. One example of such is the way in which courts give preference to interpretations that are seen as favorable to public interest, over those seen as upholding the contracting parties' consent. *See, e.g.*, De Long Corp. v. Lucas, 176 F. Supp. 104, 122 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 804 (2d Cir. 1960); Houk v. Ross, 296 N.E.2d 266, 274 (Ohio 1973); Ferguson v. Beth-Mary Steel Corp., 172 A. 238, 240 (Md. 1934); Seman v. First State Bank of Eden Prairie, 394 N.W.2d 557, 560 (Minn. Ct. App. 1986); *see also* Patterson, *supra* note 77, at 855.

account while examining consent. Consent is undoubtedly connected to the will, choices, and intentions of the parties, but it is also molded by public policy considerations that go beyond the parties' interactions. As such, consent is dynamic, its nature changing over time as the result of broader social changes. Indeed, similar fact patterns in cases of consent can yield a variety of different conclusions when examined through the lens of various norms and values. In this light, consent must be viewed not only as a decision based on full information and reached without coercion, but also one which is socially and culturally situated.[265] Similarly, consent is not only a matter of dynamics between contracting parties, but also a product of external societal circumstances, pressures, constraints, morals, norms, conventions, and understandings that go beyond the parties' own relationships.[266] Thus, this Article argues that public policy must be taken into account in consent analysis itself, rather than be viewed exclusively as a factor that affects contract enforcement.

Public policy considerations—i.e., social context—broaden the analysis of consent beyond the contexts discussed in the previous subparts. Contract law contains an inherent element of public considerations, which clearly renders consent as a social construct with public dimensions greater than the scope of a personal decision based on the contracting parties' will and choices.[267] Consent is not only an individualistic process, formed in a vacuum between the contracting parties' will, autonomy, interests, and preferences. Consent is necessarily formed under social circumstances.

As in the case of consent to sex,[268] consent to a contract is socially constructed.[269] Gender, race, and class are all factors that shape consent.

265. 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, 385–88 (1985); *see also* Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1438–39 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449, 1449–50 (1986).

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

267. *See* Eskridge, *supra* note 1, at 54–55 (discussing consent to sex).

268. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171–83 (1989); Eskridge, *supra* note 1 *passim*; Robin West, *The Harms of Consensual Sex*, *in* THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 317 (A. Soble ed., 4th ed. 2002).

269. *See, e.g.*, Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 704 (1990) ("In rape law, consent

Consider for example, Debora Threedy's work on the Arthur Murray cases.[270] These cases involved dancers' claims against enforcing their contracts with the Arthur Murray studio.[271] In her review of the cases, Threedy shows how race, gender, and class shaped the interactions between dancers and the Arthur Murray dance studio, and the former's legal claims against the latter.[272] Threedy's study of the Arthur Murray cases is not only a contextual analysis of these cases, but also reveals how public policy considerations implicitly shaped the way the courts viewed the contractual interaction between the parties.[273] Similarly, Patricia Williams discusses the formality of the rent contract she signed and contrasts it with the informal handshake contract of her white colleague.[274] Williams' story is clearly not only one about two different types of contract formation; it is an illustration of how race is a factor in the fashioning of consent.[275] Jeffrey L. Harrison discusses the disparity between two differently classed law professors' salary expectations and the differences between their interactions with the dean.[276] Harrison's work demonstrates the ways in which class forms social expectations, which in turn influence the type of consent in the law professors' employment contracts.[277] As detailed by these scholars and others, race, gender, and class shape one's preferences, choices, understandings, and options, and these factors in turn shape consent.[278] The question in these cases is about uneven power within societal contexts. This same lens of power and powerlessness makes it clear that one's position as a woman shapes her consent in the context of spousal agreements; one's position as an employee shapes her consent in the context of employment

historically has been socially constructed from male point of view . . . . Consent to contract is no less socially constructed . . . .").

270. Threedy, *supra* note 137 *passim*.

271. *Id.* at 753–54.

272. *Id.* at 767.

273. *See id.* at 769.

274. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406–08 (1987).

275. *See generally* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 *passim* (1997).

276. Jeffrey L. Harrison, *Teaching Contracts from a Socioeconomic Perspective*, 44 ST. LOUIS U. L.J. 1233, 1239–40 (2000).

277. Jeffrey L. Harrison*, Defects in Consent and Dividing the Benefit of the Bargain: Recent Developments*, 53 U. LOUISVILLE L. REV. 193, 200–01 (2015); *Id.* at 1238–39.

278. *See, e.g.*, Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 668 (2010) (examining how race, gender, class, and other social factors shape reasonable expectations).

agreements; and one's position as a consumer shapes her consent in the context of standard form contracts. This Article will now return to these three types of contracts, respectively, in order to further develop the ways in which public policy fashions consent.

Recall that in *Balfour*, the court did not enforce Mr. Balfour's promise to pay his wife a monthly allowance in part because of public policy considerations.[279] As the court observed, "[E]ach house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."[280] To hold otherwise, argued the court, would mean "that the small [c]ourts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations."[281] According to the court, public policy considerations went against enforcement of the contract in this case, but were deemed irrelevant in terms of analyzing the consent therein.[282] However, this Article holds that the context of marriage indeed shaped the court's view of consent, if subtly. Were this case taking place in a business context, a similar monthly payment obligation would not only change the analysis of consideration, but would also be interpreted as consent to a commercial bargain. But because of the court's conceptions about marriage, the court refused to see consent in this case to be legally binding.[283]

As in *Balfour*, the court's ruling in *Borelli* was also based on a conclusion that drew, in part, from public policy.[284] At first glance, it would seem the majority and the dissent differed in this case on the issue of consideration.[285] However, the majority's conservative view of marriage led to its conclusion that there was no consensual transaction between the spouses, as in *Balfour*.[286] Thus, the court refused to enforce the contract between Mr. and Mrs. Borelli.[287] The dissent, however, influenced by social

279. *See* Balfour v. Balfour, 2 K.B. 571, 579 (1919); s*ee also* Dade v. Anderson, 439 S.E.2d 353, 356 (Va. 1994); Mays v. Wadel, 236 N.E.2d 180, 183 (Ind. App. 1968); Miller v. Miller, 35 N.W. 464, 464 (Iowa 1887), *aff'd*, 42 N.W. 641 (1889); Church v. Church, 630 P.2d 1243, 1250–51 (N.M. Ct. App. 1981).

280. *Balfour*, 2 K.B. at 579.

281. *Id.*

282. *See id.* at 578–79.

283. *Id.* at 579–80.

284. *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 19–20 (Ct. App. 1993).

285. *See id.* at 20, 24.

286. *Id.* at 20.

287. *Id.*

changes in the institution of marriage, saw consent present where the majority saw none.[288]

As the *Borelli* decision demonstrated, public policy can and does change over time. Societal concepts of marriage once barred contracts between spouses; the modern view of marriage now approves agreements between spouses.[289] This modern view does not see marriage and contract as contradicting terms; rather, marriage itself is viewed as a contract.[290] Similarly, the public policy consideration of preserving marital relations should play an important role in the judicial analysis of consent to marital agreements.[291] Moreover, in today's era, public policy acknowledges not only changes in the conception of marriage, but also marriage alternatives and nonmarital relations.[292] This, in turn, goes to the heart of consent: whether the court sees consent as present or not depends, in large part, on social values. As such values change, courts may find consent where previous courts did not. Public policy considerations affect consent analysis deeply and profoundly.[293]

Employment cases also demonstrate the importance of public policy considerations in examining consent. Recall that in *Embry*, the court analyzed a conversation between employee and employer and concluded they had formed a valid contract.[294] In reaching this decision, the court was implicitly influenced by the public policy concern of protecting employees, especially vulnerable employees dependent on continued employment for their livelihood.[295] Rather than being implicitly influenced by the employment context, this should be factored into the court's consent analysis. The dependency and urgency on the part of the employee and the misuse of bargaining power on the part of the employer are factors shaping

288. *Id.*

289. *See, e.g.*, Radin, *From Babyselling to Boilerplate*, *supra* note 8, at 342 ("[W]hat counts as enforceable contract varies over time and place.").

290. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 *passim* (1998).

291. *See, e.g.*, Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 *passim* (1935) (protecting relations under tort).

292. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

293. *See, e.g.*, Brooks v. Brooks, 733 P.2d 1044, 1050 (Alaska 1987); *In re* Marriage of Boren, 475 N.E.2d 690, 694 (Ind. 1985); Newman v. Newman, 653 P.2d 728, 731 (Colo. 1982); Volid v. Volid, 286 N.E.2d 42, 46 (Ill. App. Ct. 1972).

294. Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 779 (Mo. Ct. App. 1907).

295. *See id.*

the interaction between them and, hence, are relevant to consent. Of course, maintaining work relations is also a public policy consideration that affects the analysis of consent in employment agreements.[296] This and the above does not necessarily mean this Article advocates a blanket pro-employee approach. Rather, these ideas are simply brought forward in order to emphasize the need to view consent to employment agreements in the larger context of the employment market. As in the context of marriage, changes in the courts' view of employment relations would necessarily lead to changes in the courts' examination of consent to employment contracts. For example, courts which acknowledge the inequalities between employees and employers and are willing to intervene in employment relations in order to protect the former would likely see consensual promises by the employer as enforceable. On the other hand, courts adhering to a worldview which emphasizes the primacy of market transactions and contracts at will, and which do not regard the power imbalance in the employment context as a relevant factor would, in all likelihood, not see consent as relevant in the context of work relations.[297]

The case of *United Steel Workers of America* demonstrates the need for judicial consideration of the relationships between employers, employees, townspeople, and unions.[298] These relationships inherently shaped the communications and understandings between the parties.[299] In order to examine whether the employer made an enforceable promise to the employees, the court should have examined the larger social context and the nexus of relations not only between the employer, the employees, and the union, but also between the town and the plant. The court failed in its efforts to truly examine consent by disregarding the factors affecting consent.

In the case of *Hill*, the court alluded to public policy considerations in the context of contracts of adhesion: "Practical considerations support

296. For public policy considerations in the employment-agreement context, see Daley v. Aetna Life & Cas. Co., 734 A.2d 112, 133 (Conn. 1999); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 387 (Conn. 1980); Hooper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 546 (Wyo. 1993); *see also* Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 377 (1986).

297. *See* Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 23–24 (1999) (noting there is no discussion regarding consent).

298. *See* United Steel Workers of Am. v. U.S. Steel Corp., 492 F. Supp. 1, 9–10 (N.D. Ohio 1980).

299. *See id.* at 4.

allowing vendors to enclose the full legal terms with their products . . . . Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device."[300] In *ProCD, Inc.*, the court similarly reasoned, "Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets." [301] While these statements partially acknowledge the public policy considerations behind standard form contracts, they fail to make the connection between public policy considerations and consent to standard form contracts.[302]

In contracts of adhesion, public policy considerations should include not only those intended to maintain commerce, but also those meant to protect consumers; the court should balance these two conflicting interests. Given the fact that negotiations do not occur in the shrinkwrap contract context and that full disclosure of technical and professional information to the layperson consumer is impossible, a power imbalance is inherent between consumers and corporations. Policing the fairness of the transaction, prohibiting misuse of power while maintaining a market of goods, and facilitating efficient transactions are all factors present in the background of a contract's execution. These factors should affect the courts' consent analyses.

As the above examples demonstrate, consent is shaped by social perceptions and understandings—of marriage, of employment, and of commerce. Consent is impacted by public factors that stretch beyond the relations between the contracting parties at hand and their relational contexts.

One might argue there is no difference between considering public policy as a doctrine of contract enforcement and considering public policy as part of consent, and the bottom line will be the same either way. However, this Article holds that the second option—considering public policy's role in consent—will result in a more developed and realistic concept of consent, which in turn, will enrich and improve the field as a whole. As demonstrated above, courts are already influenced by their views of marriage, employment, and commerce relations; rather than this being a hidden

300. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

301. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–31 (1995)).

302. *See Hill*, 105 F.3d at 1149; *ProCD, Inc.*, 86 F.3d at 1455.

subtext in court deliberations, public policy considerations should be an explicit, integral part of consent analysis.[303]

The claim that contract law has public aspects and is shaped by public policy considerations is not new:[304] the very concept of consideration is itself influenced by public policy considerations,[305] and contract interpretation continues to be shaped by race, culture, and class.[306] Indeed, "social values should, and do, play a key role in the interpretive process."[307] This Article holds that the public policy spotlight should be held specifically over consent within contract law.

D. *Consent in Concentric Circles*

In the final subpart, this Article addresses the relationship between the three aspects discussed above. Using the metaphor of concentric circles,[308] this subpart suggests that the inner circle represents the current narrow and limited notion of consent, which focuses on ensuring that consent is informed and voluntary. From there, each additional circle layers another level of complexity onto the meaning of consent. The first outer circle recognizes consent as a spectrum, rather than a binary concept. The next circle represents consent in context. The final circle concerns public policy's effects on consent analysis. Figure 1 below illustrates this layered notion of consent.

303. *See supra* Part III.C.

304. *See, e.g.*, Olha Cherednychenko, *Private Law Discourse and Scholarship in the Wake of the Europeanisation of Private Law*, *in* THE TRANSFORMATION OF EUROPEAN PRIVATE LAW: HARMONISATION, CONSOLIDATION, CODIFICATION OR CHAOS? 148–49 (James Devenney & Mel Kenny eds., 2013); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).

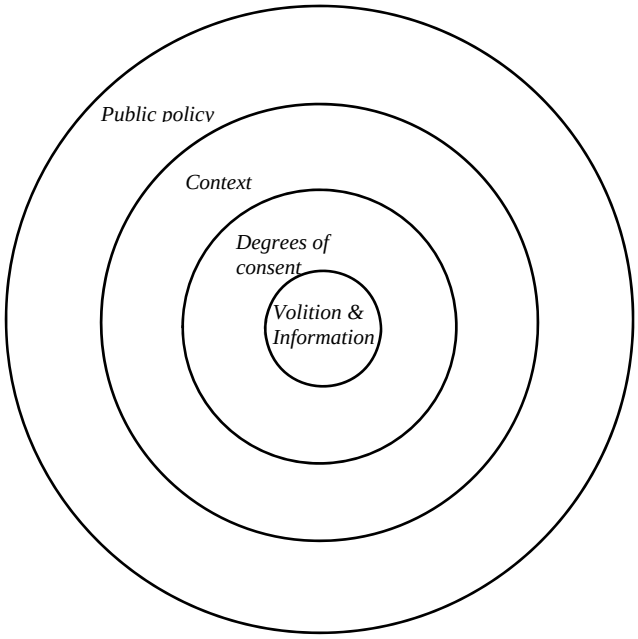
305. *See, e.g.*, Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 95–96 (1993) (noting the court in *Gulf Towing Co. v. Steam Tanker, Amoco N.Y.* found an exculpatory clause unenforceable "both because it lacked consideration and because it violated public policy").

306. *See, e.g.*, Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 7–8 (2008).

307. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1714 (1997).

308. *See, e.g.*, Lauren Gaffney, *The Circle of Assent: How "Agreement" Can Save Mandatory Arbitration in Long-Term Care Contracts*, 62 VAND. L. REV. 1017, 1023 (2009) (using the circle of assent doctrine); Robert M. Lloyd, *The "Circle of Assent" Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. L. 237, 238 (2006); John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 6 (1969) (using the term "circle of assent").

Figure 1: Consent in Concentric Circles



The first aspect demonstrates how consent varies in degrees. The second aspect, context, shows how consent comes in different forms and shapes. The third aspect shows that while consent must include private considerations of the parties' wishes, intentions, and interests, it is also a public issue. While the context aspect examines the circumstances surrounding consent (such as negotiations, relations of power or trust between the parties, etc.), the third aspect, public policy, adds social considerations that go beyond the individual parties at hand (such as economic considerations of a larger market and the stability of contracts, as well as factors like race, gender, and class). Together these aspects form a rich and layered formulation of consent.

At present, judicial analysis of consent remains narrow, focusing only on the informed and voluntary aspects of consent.[309] This Article sought to

309. For a critique of the narrow nature of consent, see Leo Katz, *Choice, Consent, and Cycling: The Hidden Limitations of Consent*, 104 MICH. L. REV. 627 *passim* (2006).

add three layers to this analysis in order to develop a richer concept of consent. Consent is not binary, but exists along a spectrum.[310] In between full and free consent, on one end, and no consent, on the other, lie hypothetical consent and implied consent, as well as partial, questionable, and intermediate consent. The first circle in this figure incorporates these gray areas of consent. The next circle represents context. Consent is nuanced and contextual and depends on circumstances; it varies in different types of contracts, and is in part determined by the type of relationship between contracting parties (e.g., spousal, employment, or business relations). The third circle represents public policy considerations. Consent is influenced not only by the relationships between the parties, but also by larger cultural and social context. Consent is socially situated: the consenting party's position in society (gender, race, class) shapes his or her consent.

This broader illustration of consent includes the personal wishes, choices, and preferences of the contracting parties, the dynamics of the relations between the parties, and social and cultural values, constraints, and understandings. Each of the aspects expands the notion of consent, and together they form a more robust, nuanced notion of this important contractual concept. This layered notion of consent is not as easy to operate and apply as a black-and-white notion of consent; but the world is not black and white. This notion of consent is thus ultimately a more realistic one than the simplified notions commonly used in contract law today.

That said, this is only a preliminary study of consent. Even after considering a spectrum view of consent, intraparties context, and public policy, consent remains a complex concept with various nuances waiting to be explored. More aspects, layers, and circles need to be added to the analysis of consent, and more work needs to be done in order to further our understanding of consent.

IV. CONCLUSION

This Article sought to highlight and explore the many shades of consent. Consent is gradual, contextual, and socially constructed. It is a rich and complex concept, not limited to its informed and voluntary aspects. It is not only correlated to the will, intentions, choices, and preferences of parties, but also contains public and cultural aspects. Consent is a layered concept: it comes in different forms, may exist to varying degrees, and is shaped by the relations between the parties, as well as by social and cultural context.

310. *See* Porat, *supra* note 96, at 1412 (arguing for a nonbinary defense in contract laws).

Consent is a powerful concept in contract theory; the model suggested by this Article aims at developing a more meaningful concept of consent in practice, as well. The complex, yet realistic notion of consent offered by this Article could enable the courts to better apply consent, and to recognize consent for what it is: pluralistic, diverse, and colorful. Indeed, like sexual consent, contractual consent has many faces.