

# EXPOSING THE MYTH OF CONSENT

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## 1. INTRODUCTION

*Consent* is a critical concept for law. Private law often rests upon the ability of people to create binding changes of legal status, rights, and obligations. Contract, property, and tort law, for instance, all create opportunities for a legal actor to make such changes, whether through binding promises, changes of ownership, or the waiver of claims or defenses. The ability of a particular actor to make such changes is often evaluated in terms of whether consent has been given. That, in turn, depends on the capacity of the actor to give consent. However, our prevailing legal and social conceptions concerning capacity run in tension with reality. On the one hand, an artificial presumption of substantial and un-buffered adult capacity for binding consent is useful for ease of legal administration and social organization. On the other hand, the reality of flawed information, inexperience, a lack of attention, and cognitive

disabilities all too frequently put the lie to that presumption of perfect adult capacity.

Notwithstanding the plentiful evidence of human limitation, the law makes the most radical vision of unfettered capacity and consent the default rule. We, the authors, believe this vision is better viewed as a special case. A more nuanced view of our actual capacities rests, in part, on the understanding neuroscience provides. This perspective suggests that we should match our rules and jurisprudential approaches to the variable capacities that we all show in different contexts and stages of life. Such a view helps jurists to develop and deploy effective *enhancers* and *buffers* around consent that reflect a more realistic treatment of capacity. We take a hard look at the myth of consent to add some of the tools and insights of cognitive neuroscience and social psychology to the traditional staples of psychology, economics, politics, and philosophy. And we proffer innovative approaches, such as the framework of *legal assent*, explored in prior work and summarized in this article.<sup>1</sup>

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<sup>1</sup> Professor Drobac has been exploring the myth of consent with respect to juveniles since 2004. See Jennifer A. Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 472 n.4 (2004) [hereinafter *Sex and the Workplace*]; Jennifer A. Drobac, *"Developing Capacity": Adolescent "Consent" at the Workplace, at Law, and in the Sciences of the Mind*, 10 U.C. DAVIS J. JUVENILE L. & POL'Y 1, 3 n.7 (2006) [hereinafter *Developing Capacity*]; Jennifer A. Drobac, *A Bee Line in the Wrong Direction: Science, Teenagers, and the Sting to "The Age of Consent"*, 20 J.L. & POL'Y 63, 65 n.9 (2011) [hereinafter "Bee Line"]; Jennifer A. Drobac, *Wake Up and Smell the Starbucks Coffee: How Doe v. Starbucks Confirms the End of the "Age of Consent" in California and Perhaps Beyond*, 33 B.C. J.L. & SOC. JUST. 1, 2 (2013) [hereinafter *Wake Up*]. Along with this inquiry came the understanding of the law's presumption of the "on/off" switch of juvenile capacity and the notion of *legal assent*. See "Bee Line" at 113; *Wake Up* at 41; Jennifer A. Drobac & Leslie A. Hulvershorn, *The Neurobiology of Decision-Making in High Risk Youth & The Law of Consent to Sex*, 17 NEW CRIM. L. REV. 502, 522 n.57 (Summer 2014) [hereinafter *The Neurobiology of Decision-Making*]; JENNIFER A. DROBAC, *SEXUAL EXPLOITATION OF TEENAGERS: ADOLESCENT DEVELOPMENT, DISCRIMINATION, AND CONSENT LAW* (Univ. of Chi. Press forthcoming 2015) [hereinafter *SEXUAL EXPLOITATION OF TEENAGERS*].

We recognize that our discussion of consent will involve some conflation of not fully equivalent doctrines and modes of analysis. Ideas about consent are deeply intertwined with such related topics as the keeping and enforcement of promises, contract formation, waiver of existing rights, and the transfer of property. These related topics are all part of a *cognitive cluster* around a set of attitudes and assumptions on human agency. The elements in this cluster range from highly formal economics to relatively simplistic “folk psychological” principles.<sup>2</sup> Their wide acceptance supports the idea of radical consent as the appropriate “default” approach to the law of binding action. In our discussions, we will take the license that the somewhat diffuse nature of our target provides. We examine elements of this cluster without necessarily parsing the strands of connectivity and the points of comparison and distinction that we would make in a more comprehensive treatment or monograph.

*A. Legal Defaults can be Useful but Need to Complement Reality*

We recognize that legal defaults and presumptions have their utility. They reflect political, philosophical, and cultural perspectives and in some cases make the operation of law more efficient. For example, in criminal law, Americans assume that the accused is innocent until proven guilty.<sup>3</sup> This default assumption reflects people’s shared perception that the law should give people accused of a crime the benefit of the doubt and assume an original

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Professors Drobac and Goodenough join together on this project to examine the myth of consent in other contexts and to broaden the application of legal assent.

<sup>2</sup> See, e.g., Stephen Morse, *Determinism and the Death of Folk Psychology: Two Challenges to Responsibility from Neuroscience*, 9 MINN. J. L. SCI. & TECH. 1 (2008). In this and other related articles, Professor Morse explores the folk psychological models of agency and capacity in the context of criminal law, and concludes that these models are “safe” from the challenge of neuroscientifically informed psychology.

<sup>3</sup> E.g., *Coffin v. United States*, 156 U.S. 432 (1895).

position of innocence. This default also provides an efficient starting point for all parties such that the prosecution must prove criminal guilt beyond a reasonable doubt.<sup>4</sup>

Criminal law also has default assumptions around the concepts of agency and responsibility that have some correspondence to the questions of civil capacity and consent that we examine here. These criminal law concerns have previously attracted significant attention from scholars applying neuroscientific reasoning to legal doctrine.<sup>5</sup> On the whole, however, we feel that the strategic questions governing the application of third party punishment that underlie the criminal doctrines are different from the questions of how people bind themselves by their declarations and actions in the civil context. This paper focuses on civil law, and we will not undertake a review of the criminal law discussions in this context. Indeed, the intersection of law and neuroscience has been limited by a predominant attention to questions of criminal law. The symposium that gave rise to this paper and its companions in this issue had a refreshing focus on civil matters.

Of course, civil law also has its common defaults—and the capacity to consent is one of them. Historically, our society has assumed that mature adults have the capacity to give legal consent immediately and permanently, applicable in many contexts under the law. Consent, as we use it, refers to the ability of an actor to irrevocably change her position before the law with respect to some aspect of her rights, duties, or status. Consent may be explicit or inferred from conduct. Thus, legal consent indicates understanding and agreement to a proposed interaction. Consequences flow from a breach or action inconsistent with consent. The whole system can produce results as trivial as

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<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183 (2009) (critiquing claims concerning the neurobiology of criminal violence and suggesting appropriate using of neuroscience in criminal law).

the obligation to pay for a bottle of soda or as life changing as the relinquishment of rights worth millions of dollars.

A number of reasons justify the recognition and enforcement of such a potentially radical action. For many people, the idea that one's word is one's bond is a matter of deeply ingrained cultural or even religious conviction. As such, legal consent reflects our presumption that society can and should hold an adult accountable for her consent, her "word." At a more theoretically grounded level of justification, neoclassical economists assume that informed, autonomous actors strike welfare-maximizing bargains through free contracting. These actors exchange bargained-for consent to arrive at efficient, productive deals, often demonstrating "Pareto efficiency."<sup>6</sup>

The starting assumption that legal actors can bind themselves quickly and permanently reflects a judgment that mature adults are rational actors. Adults are capable of gathering and processing information fully and determining their will freely. They so engage with a clear understanding of both short and long term consequences and values. Milton Freedman—perhaps the archetype of the neoclassical economist—recognized this kind of actor in his declaration: "The possibility of coordination through voluntary cooperation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, *provided the*

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<sup>6</sup> MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 7 (1973); Roy Weintraub, *Neoclassical Economics*, *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (2007), available at <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html> (last visited Apr. 5, 2015); see also VILFREDO PARETO, *MANUEL D'ÉCONOMIE POLITIQUE* (1909); John S. Chipman, *Pareto: Manuel of Political Economy*, available at <http://www.econ.umn.edu/~jchipman/DALLOZ5.pdf> (last visited Apr. 5, 2015). The use of the term "neoclassical economics" throughout this article is a useful, and commonly adopted, shorthand to describe a particular school of thought. Neoclassical economics frequently has more nuance than is ascribed in our text. We note that Trebilcock makes use of this shorthand description in his important and widely cited work on contractual limits.

*transaction is bilaterally voluntary and informed.*<sup>7</sup> Jurists, in turn, frequently assume this perfect contracting machine as the human baseline for much of our law of consent. Arguably, such assumptions have provided us with a predictable and efficient basis for operation in ordering relations between individuals, organizations, and groups, allowing the possibility that Freedman invokes. Just as arguably, however, these assumptions can result in predation, unfairness, and devastating unintended consequences. A legal tool as powerful as permanently binding consent needs to be nuanced, reality-based, and applied with care.

### *B. Goals of this Article*

This Article, an introduction to the authors' broadening research agenda, challenges the legal default of unquestioned human capacity for consent. It posits that legal capacity for consent is not an "on/off" switch. It questions the notion that capacity—our rough filter for the ability to consent—flips on at some relatively arbitrary time that one might, as a matter of tradition, call "the age of consent," and off again with early onset dementia or Alzheimer's disease.

By highlighting that most negotiating parties, in a given moment or context, may possess rather less than legally presumed capacity to consent, this Article emphasizes the need for legal reform. Rather than radical change, the Article recommends systemic application of existing and newly devised tools to establish a more nuanced approach to our recognition of consent. A nuanced approach facilitates interpersonal interactions with much of the same efficiency and rather less of the potential for abuse that exists in more radically absolute ideas of consent.

Some of these tools are already in use. For example, the "infancy defense" in contract law, which makes contracts voidable by "consenting" minors, has existed for hundreds of

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<sup>7</sup> MILTON FREEDMAN, CAPITALISM AND FREEDOM 13 (1962) (emphasis added); see also TREBILCOCK, *supra* note 6, at 7.

years.<sup>8</sup> However, jurists have not thought of these legal devices as *neurojuridical tools* because neuroscientific discoveries have only recently begun to confirm the psychosocial evidence that contradicts common assumptions about consent and capacity.<sup>9</sup> Neuroscience shows how juveniles, elders, and many contracting adults may lack specific capabilities while possessing others. When people understand that brain function affects decision making, jurists can use neuroscience to discern better how incomplete functional capacity may influence legal capacity. Additionally, neurojuridical tools highlight when jurists may recognize legal consent or when they should identify a new action, *legal assent*, a legal reform that requires no presumption or existence of legal capacity.

Part II begins by setting out a few concrete examples that demonstrate how the more radical “neoclassical approach” to consent disserves many populations, including not only the young and old, but all people, depending on the contexts. For example, healthy adult actors who have less bargaining power or information than their relational partners encounter disadvantages in an un-buffered free market world. This section introduces some of the confusion one finds in the way the law currently addresses capacity and decision-making limitations.

Part III explores some of the justifications offered for the wide application of a radical neoclassical vision of consent. It also offers critiques of these justifications and sets out affirmative arguments for a more nuanced approach to issues of consent. In a number of these arguments, we anticipate how neurojuridical tools, based on a better understanding of the cognitive and psychosocial capacities that shape and limit an ability to consent, can help jurists to create better solutions. Part III suggests that in a just society parties maintain a framework of un-waivable duties that they owe each other in order to prevent predation and

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<sup>8</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(a) (1981).

<sup>9</sup> E.g., Michelle Baddeley, *Herdling, Social Influence And Economic Decision-Making: Socio-Psychological And Neuroscientific Analyses*, 365 PHIL. TRANS. R. SOC. 281, 286 (2010). See discussion *infra* Part IV.



abuse. In such a society, bounded consent, or perhaps *legal assent*, can better foster the structure of reliable expectations on which social and economic interactions depend.

Part IV explores how neuroscience and psychosocial evidence contributes to an understanding of developing, declining, and limited legal capacities that produce mythical consent. In particular, this section examines a few specific studies that explore what might be happening in an actor's brain that arguably compromises a transaction or taints the legal significance of the consent proffered. Part IV demonstrates how scientific evidence can inform an understanding of these fraught bargains. Scientific evidence sheds light on the reality of human capacities rather than merely asserting some imagined ideal human actor.

Part V begins with an analysis of how traditional law has buffered, qualified, or even disregarded, in a fragmented manner, the radical neoclassical consent myth and approach under certain circumstances. Examples include coercion, undue influence, discrimination, breach of fiduciary duty, incapacity, and other compromising factors. Part V then explores new legal tools for dealing with the relinquishment of rights, duties, and status. In particular, it reviews *legal assent*, a mechanism that presumes no threshold *legal capacity* but affords teenagers, the declining elderly, and other adults both autonomous decision-making authority and protection following misguided decisions.

In sum, we demonstrate that presumed capacity taints bargains made by at-risk individuals, a class that includes all of us depending on the context. The strategic recognition and use of neurojuridical tools identifies at-risk parties and circumstances and sheds light on the problematic nature of consent offered on some occasions. Legal reforms prompted by that enlightenment will facilitate optimum consensual relations and ultimately foster the Pareto enhancing goals, now mistakenly linked to a more radical vision of consent.

## II. APPLICATION OF THE RADICAL NEOCLASSICAL APPROACH TO CONSENT CAN LEAD TO INJUSTICE, AMBIGUITY, AND PREDATION

A neoclassical approach to contract generally assumes that parties have equal bargaining power and access to information. Through rational negotiations, these parties arrive at a mutually beneficial Pareto optimum. The beauty of this approach to contracting is that the parties exercise their autonomous choices freely to maximize what they respectively value through the bargain. The problem is that the neoclassical model does not always reflect reality.

### *A. Consent by Teenagers or Sexual Exploitation?*

One situation in which the freedom to consent leads to problematic bargains involves adolescent consent to sex with an adult, for example, a teacher or a work supervisor. The radical neoclassical approach assumes equal knowledge, power, and operational freedom. When the actors consent, the neoclassical model affords both actors binding authority. However, teenagers may not have the experience, information, authority, or freedom that their adult consorts enjoy.<sup>10</sup> The neoclassical assumptions do not account for such variation.

Laws treat these teenagers inconsistently. Sometimes statutes credit them with adult legal capacity to contract and sometimes laws treat them as infants. For example,

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<sup>10</sup> For a thorough, detailed, and updated discussion of the neurological and psychosocial development of teenagers, see SEXUAL EXPLOITATION OF TEENAGERS, *supra* note 1. See also Jennifer A. Drobac, *Consent, Teenagers, and (Un)Civil(ized) Consequences*, in CHILDREN, SEX AND THE LAW (Ellen Marrus & Sacha Coupet eds., forthcoming 2015) [hereinafter *(Un)Civil(ized) Consequences*]; Jennifer A. Drobac, *I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas*, 70 ALB. L. REV. 675, 713–17 [hereinafter *I Can't to I Kant*]; see generally *Developing Capacity*, *supra* note 1, at 1.

until a teenager has reached the “age of consent,”<sup>11</sup> statutory rape law may apply to erase any defensive meaning (for the adult perpetrator) that adolescent consent carries.<sup>12</sup> Thus, consent is no defense and it has no legal influence. Even as criminal law may invalidate the legal significance, however, civil law might credit adolescent consent to bar the teenager from recovery for her injuries under tort or antidiscrimination law.<sup>13</sup> Has the actual *capacity* of the minor changed between these two contexts? Clearly not. No matter. As between the same actors, acts, and situation, the law gives “consent” multiple meanings. However, none of these separate meanings accurately captures the nuances of the minor’s overall developing

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<sup>11</sup> The “age of consent” commonly refers to the age at which a minor (someone under eighteen years old) may legally consent to engage in sexual activity with an adult and, thereby, insulate that adult from criminal prosecution. See Age of Consent, WIKTIONARY, en.wiktionary.org/wiki/age\_of\_consent (last modified Apr. 28, 2015 06:49 PM) (“[Age of consent] is used to indicate the age at which it is no longer a crime for someone else to engage in consensual sexual intercourse with the person who is still younger than the age of consent . . . .”) (emphasis omitted). But see *Donaldson v. Dep’t of Real Estate*, 36 Cal. Rptr. 3d 577, 588–89 (Cal. Ct. App. 2005) (noting while “age of consent” has often been used by courts “as shorthand for the age below which . . . sexual relations would support a charge for statutory rape,” the phrase may refer to the age at which a minor can legally consent to marry).

<sup>12</sup> See, e.g. CAL. PENAL CODE § 261.5(a) (West Supp. 2012) (prohibiting unlawful sex with a minor); *Ages of Consent in North America*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Ages\\_of\\_consent\\_in\\_North\\_America](http://en.wikipedia.org/wiki/Ages_of_consent_in_North_America) (last modified Apr. 29, 2015, 7:38 PM); *Worldwide Ages of Consent*, AVERT, <http://www.avert.org/age-of-consent.htm> (last visited Apr. 5, 2015).

<sup>13</sup> For list of states in which state civil and criminal law treatment of adolescent consent conflict, see Drobac & Hulvershorn, *supra* note 1, at 525–26; see also NPR staff, *Criminal Law Says Minors Can’t Consent—But Some Civil Courts Disagree*, ALL THINGS CONSIDERED (Nov. 16, 2014), <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=364538087&m=364561418> (interviewing Professor Drobac about a sexual abuse case involving a student in the Los Angeles Unified School District and the conflicts between California state criminal and civil laws).

capacity.<sup>14</sup> Criminal law invalidates her consent; civil law credits her consent.

*1. Doe v. Starbucks, Inc.*

The California matter involving Jane Doe, Timothy Horton, and Starbucks demonstrates this multiple and conflicting assignment of meaning.<sup>15</sup> In 2005, twenty-four-year-old Timothy Horton worked as Doe's supervisor at Starbucks. They allegedly engaged in sexual activity after Horton made "perhaps hundreds" of profane, sexually explicit remarks concerning his sexual interest in this sixteen-year-old subordinate barista.<sup>16</sup> Doe argued that she had initially spurned his attention but that she finally acquiesced, hoping that he would stop.<sup>17</sup> Doe explained:

[Horton] demanded that I perform oral sex on him, which I did. I felt like I had to—that I had no choice. . . . I felt that, because he had given me marijuana and I had smoked it with him, I had to do what he said, because he was my Supervisor and I didn't want to lose my job.<sup>18</sup>

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<sup>14</sup> In 2004, Professor Drobac first introduced the notion of "developing capacity." *Sex and the Workplace*, *supra* note 1, at 518-19 (distinguishing the concept from "diminished capacity" because "diminished" carries a negative connotation and suggests that capacity should exist or may once have existed, and arguing, "[m]ost teenagers suffer not from impairment but from immaturity—a blameless condition and a natural phase of growth.")

<sup>15</sup> See Drobac, *Wake Up*, *supra* note 1, at 29-32.

<sup>16</sup> *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773 \*2 (C.D. Cal. Dec. 18, 2009) (quoting Starbucks's Objections to Plaintiff's Evidence at 9:9-10:8, *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

<sup>17</sup> *Id.* at \*1, \*4 (citing Doe Declaration ¶ 4, *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)).

<sup>18</sup> Starbucks, 2009 WL 5183773, at \*3, \*4 (quoting Doe Declaration ¶ 20, *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)). Doe and Horton engaged in sexual activities regularly through June 2006. *Id.* at \*5. In addition to

Horton pressured Doe to keep their relationship a secret.<sup>19</sup> In 2006, however, Doe told her mother and quit Starbucks to check into a mental health treatment facility.<sup>20</sup>

California law treated Doe's consent to sex with Horton in completely inconsistent ways. "Horton pleaded guilty to a criminal charge of unlawful sexual intercourse with a minor under 18."<sup>21</sup> In that criminal case charged under California Penal Code section 261.5, Doe's consent was no defense to the strict liability offense. Presumably, California ignores the minor's consent because legislators believe that minors do not possess the requisite capacity to consent.<sup>22</sup> Doe brought a parallel civil claim against Starbucks and Horton, however, for sexual harassment and tort claims.<sup>23</sup> In the 2009 *Doe v. Starbucks, Inc.* decision, the California federal trial court determined that Doe's consent to sex with her supervisor merited legal recognition.<sup>24</sup> Same people, same conduct, same consent, but criminal and civil law dictated different legal treatment.

The *Starbucks* court relied on dictum from a 2001 California Supreme Court incest decision, *People v.*

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"vaginal intercourse and oral copulation" at work and offsite, "[t]hey exchanged explicit sexual comments and text messages at work." *Id.* (quoting Plaintiff's Statement of Material Facts ¶¶ 20, 25, *Doe v. Starbucks, Inc.*, No. SACV 08-0582 AG(CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009)) [hereinafter PSMF].

<sup>19</sup> *Id.* at \*5.

<sup>20</sup> *Starbucks*, 2009 WL 5183773, at \*5, \*6 (citing Doe Declaration ¶ 4, *Doe v. Starbucks, Inc.*, No. SACV 08-0582AG (CWx), 2009 WL 5183773 (C.D. Cal. Dec. 18, 2009) and PSMF, *supra* note 18, ¶ 59).

<sup>21</sup> *Id.* at \*6 (citing PSMF, *supra* note 18, ¶ 63); *see* Cal. Penal Code § 261.5(a) (West Supp. 2012).

<sup>22</sup> *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 710 (2000); Tara L. Pennington, *Doe 1 V. City Of Murrieta: How The California Court Of Appeal Missed The Mark On Vicarious Liability For Sexual Torts Committed By On-Duty Police Officers*, 37 U.S.F. L. REV. 1091, 1108 (2003).

<sup>23</sup> *Starbucks*, 2009 WL 5183773, at \*6.

<sup>24</sup> *Id.* at \*7-8; *see* Donaldson v. Dep't. of Real Estate of State of Cal., 36 Cal. Rptr. 3d 577, 589 (2005).

*Tobias*,<sup>25</sup> in making its decision. Certainly, Doe argued that Penal Code section 261.5 confirmed that she did not have the capacity to consent.<sup>26</sup> The *Starbucks* court disagreed quoting *Tobias* that “in some cases at least, a minor may be capable of giving legal consent to sexual relations.”<sup>27</sup> Acknowledging that *Tobias* was a criminal case, the *Starbucks* court opined that its rule had been extended to civil cases by *Donaldson v. Department of Real Estate of State of California*.<sup>28</sup> The *Donaldson* court had reasoned that in drafting section 261.5 separate from the rape statute, Penal Code section 261, the California Legislature had abolished statutory rape as a crime. The *Donaldson* court opined, “Just as there is no longer any ‘statutory rape’ in this state, so there is no ‘age of consent’ as concerns sexual relations, and references to such a concept can only muddy the analytical waters.”<sup>29</sup> Thus, in 2005, the same year that Horton seduced Doe, the *Donaldson* court determined that there was no “age of consent” in California. The *Starbucks* court simply followed established California case law precedent.

So much for the “on” switch of legal capacity. Did Doe have the same information and experience as her twenty-four-year-old supervisor? Did she wield the same bargaining power and authority? Was theirs a mutually beneficial and efficient bargain? Can a minor of any age consent to sex with an adult in California? Under *Tobias*, *Donaldson*, and *Starbucks*, presumably so.<sup>30</sup> One wonders if a proponent of the neoclassical school would have seen

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<sup>25</sup> *People v. Tobias*, 21 P.3d 758, 761 (Cal. 2001).

<sup>26</sup> *Starbucks*, 2009 WL 5183773, at \*7.

<sup>27</sup> *Id.* (emphasis omitted) (quoting *Tobias*, 21 P.3d at 762).

<sup>28</sup> *Id.*

<sup>29</sup> *Donaldson*, 36 Cal. Rptr. 3d at 589.

<sup>30</sup> Several California legislators have announced plans to sponsor bills to correct this apparent conflict in laws. Paul Glickman, *KPCC Report on LAUSD Sex Abuse Suit Sparks 3 Bills on Sexual Consent in Civil Cases*, 89.3 KPCC, Nov. 26, 2014, archived at <http://perma.cc/8FGM-AH3D>; see also Teresa Watanabe, *State Bill Would Clarify that Youth Under 18 Cannot Legally Consent to Sex with Adults*, L.A. TIMES, Dec. 1, 2014, archived at <http://perma.cc/RAM4-E7BY>.

Pareto efficiency in the *Starbucks* result, and if so, which one—the criminal or the civil?

*2. The Radical Neoclassical Approach to “Consenting” Teenagers*

Starting from a neoclassical perspective could lead some to argue that adolescents who consent to sex with an adult deserve—and, indeed, have bargained for—the resulting consequences. Positive resulting consequences might include: emotional intimacy, satisfying sex, social prestige, mentoring, and other employment or academic benefits. Skeptical analysts may hypothesize that the risks of a harmful bargain and injury for the teenager far outweigh those for the arguably more capable adult. Negative consequences might include: unwanted pregnancy (note that California Penal Code section 261.5 is “the Teenage Pregnancy Prevention Act of 1995”), the transmission of sexual diseases, social condemnation, and psychological distress, among other harms. Thus, the neoclassical model may not assure an efficient or optimal bargain between an adult and a minor. Criminal prosecution and civil liability for personal injuries (in states that permit recovery for civil harms), not to mention social disapproval of sexually active youth, mediate against the efficiency and optimality of an unbounded sexual bargain between a teenager and an adult.

*B. Capacity and Consent by Elders and Disabled Persons*

Elders and disabled persons also encounter legal problems concerning their capacity and consent. Gerontologists understand, for example, that elders may display reasonable decision-making skills during the day but experience a condition known as “sundowning” as evening approaches. At the end of the day, an elder’s capacity may decline, and the person may become

disoriented and confused.<sup>31</sup> Thus, an elder may have the “capacity” to make certain decisions at noon, but not at 9 p.m. Legal issues for elders become even thornier after a court adjudges a person incompetent. Similarly, disabled persons may have inconsistent capabilities or the ability to engage in some activities but not in others. Consider, for example, Diane Belinky.

In 1994, Diane Belinky suffered a debilitating stroke at the age of fifty-two.<sup>32</sup> Paralyzed and barely able to speak, she entered the Drake Center, a nursing care facility.<sup>33</sup> Her husband of thirty years, Barry Belinky, visited her daily during visiting hours but then petitioned for overnight visitation. The facility denied his request, asserting that if he sexually molested his wife and she regained capacity, she could sue the nursing facility. Despite the fact that Mr. Belinky sought the opportunity to comfort his wife in the evening, not engage in sexual relations, Drake continued to deny his request. Noting advice from legal counsel, Drake referred to competence, the absence of consent, and rape case law. The appellate court reversed and held, “that a question of fact exists as to whether Drake had reasonable rules in effect which would have precluded Mr. Belinky from visiting overnight.”<sup>34</sup>

A neoclassicist reviewing the Belinky case might conclude that as long as Diane could express consent, her husband (or anyone else who wanted to have sex with her) was free to proceed. This perspective arguably puts disabled and elderly persons at risk of exploitation by a

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<sup>31</sup> See generally Alzheimer’s Association, *Sleep Issues and Sundowning*, ALZ.ORG, archived at <http://perma.cc/6MLX-86UK>; Donald L. Bliwise, *What is Sundowning?*, 42 J. AMER. GERIATRICS SOC. 1009-1011 (Sept. 1994).

<sup>32</sup> Sonja Barisic, *Man Fighting to Spend Nights With Disabled Wife to Comfort Her*, AP NEWS ARCHIVE, Feb. 22, 1996, archived at <http://perma.cc/9FGB-QPAM>.

<sup>33</sup> Sonja Barisic, *Judge Rejects Man’s Plea to Share Bed with His Wife*, SOUTHCOASTTODAY.COM, Feb. 22, 1996, archived at <http://perma.cc/3RRP-ZGDB>.

<sup>34</sup> *Belinky v. Drake Center, Inc.*, 690 N.E.2d 1302, 1308 (Ohio Ct. App. 1996).



wide variety of predators, sexual and financial. This approach also begs the question of whether a person, who cannot speak or demonstrate consent reliably, can enter into bargains or a contractual relationship. A negative answer might strip some persons, who may still have mental capacity or partial capacity, of certain rights.

One can imagine a myriad other examples of declining, inconsistent, or impaired capacity. When jurists and other professionals can use neuroscience and psychosocial evidence to determine the limits of a person's decision-making capacity, then society should afford aging persons and the disabled as much autonomy as appropriate for the individual. However, scientific inquiry and medical analysis are not always precise or sophisticated enough to allow for clear individualized classifications regarding capacity. Moreover, the law's awkward demarcations fail to account for the biodiversity that exists. Therefore, we suggest adapting law to account for the fact that the "off switch" of legal capacity is more like a dimmer or a strobe. Fading or on and off sporadically, or both.

The two extremes of the age spectrum and the disabled are not the only populations that would benefit from a more nuanced legal treatment of decision-making capacity. We all might benefit, as demonstrated in a study involving computer "click-through" agreements (CTAs).

### *C. "Click-Through" Consent by Software Users*

In April 2010, thousands of computer game customers found out that they had made a Faustian bargain with the UK-based company Game Station. As an experiment on consumer inattention, Game Station had inserted into its standard "click through" license form a clause that transferred the consenting party's immortal soul to the company. Just to further make its point, the company offered a reward of £5 to anyone who opted out of the transaction. Reports indicate that eighty-eight percent of

those agreeing to the click through accepted the transfer of the soul; only twelve percent opted for the £5 instead.<sup>35</sup>

Research by NYU law professor Florencia Marotta-Wurgler and others suggests that the twelve percent figure represents a particularly vigilant population for a CTA. Their research followed the clickstream of 47,399 households to eighty-one Internet software retailers. They measured whether the person about to enter into an Internet contract actually clicked on the terms and conditions along with the time spent looking at the terms from those who did call up the terms. They found that “even with prominent disclosure, readership, as conservatively estimated as including all consumers that access the EULA page for at least one second, remains less than 0.5%.”<sup>36</sup> The probability is that the vast majority of the persons agreeing to terms in this state of complete ignorance are normal adults—the poster-actors for the radical consent model of knowing consent.

Can the law really bind people in this kind of negligent agreement? The answer, under U.S. decisions is often yes. The seminal 1996 case *ProCD v. Zeidenberg*<sup>37</sup> considered whether “shrink wrap” terms, inside the box in a physical purchase, could bind the parties. Judge Easterbrook held it could, declaring, “Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable).”<sup>38</sup>

This logic has been extended in a number of cases to the now classic CTA, provided that the formalities of contract formation are reasonably observed.<sup>39</sup> Certainly, there are

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<sup>35</sup> Joe Martin, *Game Station: “We Own Your Soul,”* BITGAMER (Apr. 15, 2010), archived at <http://perma.cc/R6JA-6U6V>.

<sup>36</sup> Florencia Marotta-Wurgler, *Does Disclosure Matter?* 168 J. INST. & THEORETICAL ECON. 94, 97 (2012), available at <http://ssrn.com/abstract=1713860> or <http://dx.doi.org/10.2139/ssrn.1713860>.

<sup>37</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

<sup>38</sup> *Id.* at 1449.

<sup>39</sup> *See, e.g., Groff v. America Online, Inc.*, File No. C.A. No. PC 97-0331, 1998 W L 307001 (R.I. Superior Ct., May 27, 1998) (affirming the

efficiency arguments for the extension of contracting through this kind of means. Seller reputation concerns and general principles, such as unconscionability, may provide some protection against outright predation. However, no one can reasonably assert that the click of these “consenting adults” exemplifies the kind of informed understanding presumed by default under the radical model of neoclassical consent.

#### *D. The Class List Goes On and On*

While these examples amply demonstrate the problems that the law encounters from its traditional treatment of consent, the list of potential targets goes on and on. There are clearly difficulties with consent in the medical procedure area, where even legally mandated disclosure falls short of really meeting the goals of the “informed consent” standard.<sup>40</sup> Consent given by those under compulsion, such as prisoners, is classically suspect.<sup>41</sup>

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validity of a click-wrap agreement); *Hotmail Corporation v. Van Money Pie Inc.*, No. C98-20064, 1998 WL 388389 (N.D. Cal., April 16, 1998) (holding that defendants were bound by terms of service as a result of clicking on “I agree”). *See also Register.com v. Verio*, 356 F.3d 393 (2d Cir. 2004) (affirming binding nature of terms of use in a repeat transaction context). *But see Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012) (holding a subsequent email of additional terms does not bind the recipient); *Specht v. Netscape*, 306 F.3d 17 (2d Cir. 2002) (click through agreement to arbitration not binding if the terms not conspicuous) and *Dunstan v. comScore, Inc.*, No. 11-cv-05807, 2013 WL 6909514 (N.D. Ill. Dec. 3, 2013) (click through not enforceable when the contracting information was “obscured”). *See generally* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 *BERKELEY TECH L.J.* 577 (2007).

<sup>40</sup> *E.g.*, Paula Walter, *The Doctrine of Informed Consent: To Inform or Not To Inform?*, 71 *ST. JOHN'S L. REV.* 543 (1997); Jaime S. King & Benjamin Moulton, *Rethinking Informed Consent: The Case for Shared Medical Decision-Making*, 2 *AM. J.L. & MED.* 429 (2006). *See generally* Culbertson v. Mernitz, 602 N.E.2d 98, 103 (Ind. 1992).

<sup>41</sup> *See, e.g.*, 45 CFR § 46.305 (additional duties of the Institutional Review Boards where prisoners are involved). *See* Keramet Reiter, *Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations*, 97 *CAL. L. REV.* 501 (2009); Daniel R. Mendelsohn, *The*

Consumer credit agreements are notoriously one-sided, a condition that prompted creation of the Consumer Financial Protection Bureau.<sup>42</sup> As will be discussed more fully below in the context of existing legal buffers and enhancers, the Federal Trade Commission (FTC) has recognized the frequent use of certain predatory tactics in other consumer transactions as well.<sup>43</sup> Employers constantly use their greater experience to put waivers, covenants, and transfers of rights into their contracts with prospective employees. Most of these job seekers (and especially those who are desperate in a slow economy) just sign on the dotted line with little concept of what they are giving away.<sup>44</sup> Even in

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*Right to Refuse: Should Prison Inmates Be Allowed to Discontinue Treatment for Incurable, Noncommunicable Medical Conditions?*, 71 MD. L. REV. 295 (2011). *But see*, Sharona Hoffman, *Beneficial and Unusual Punishment: An Argument in Support of Prisoner Participation in Clinical Trials*, 33 IND. L. REV. 475 (2000); David J. Moser et al., *Coercion and Informed Consent in Research Involving Prisoners*, 45 COMPREHENSIVE PSYCHIATRY 1 (2004).

<sup>42</sup> *Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Apr. 5, 2015). *See About Us*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Apr. 5, 2015) (describing the mission of the CFPB in the following terms: “Above all, this means ensuring that consumers get the information they need to make the financial decisions they believe are best for themselves and their families—that prices are clear up front, that risks are visible, and that nothing is buried in fine print. In a market that works, consumers should be able to make direct comparisons among products and no provider should be able to use unfair, deceptive, or abusive practices.”).

<sup>43</sup> *See infra* notes 145-154 and accompanying text.

<sup>44</sup> *See, e.g.*, *Iskanian v. CLS Transportation Los Angeles, LLC*, No. S204302 (Cal. June 23, 2014), *available at* <http://www.courts.ca.gov/opinions/documents/S204032A.PDF> (upholding the waiver of class action rights); Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 AZ. L. REV. 939 (2012) (criticizing enforceability of employee agreements not to compete); *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000) (upholding an employment contract that mandated arbitration and invalidated court action for resolution of employment related disputes). *See generally* Craig R. Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a “Waiver Certainty” Test*, 58 FLA. L. REV. 305 (2005).

the relatively rarified world of securities and investment decisions by knowledgeable, wealthy individuals, the standard agreements require investors to consent to dispute resolution procedures which can eviscerate many legally mandated protections. “Virtually all brokerage firms include provisions in their standard-form customer agreements requiring arbitration of customers’ disputes in the FINRA [Financial Industry Regulatory Authority] forum.”<sup>45</sup> Investors routinely agree to these provisions, often with little understanding of the consequences.<sup>46</sup>

### III. JUSTIFICATIONS AND CRITIQUES OF THE RADICAL NEOCLASSICAL VISION OF CONSENT

Given the mismatch of theory and reality that these examples demonstrate, why do we accept the radical notions of capacity and consent as the starting point in so much of private law? The justifications for such an unrestricted idea of consent fall into several categories briefly summarized here. As noted above, ideas about consent are deeply intertwined with the enforcement of promises, contract formation, and other statements and actions that create legal obligations. These notions about legal obligations are not always identical in definition or function to any particular formulation of capacity and consent. Nevertheless, we believe that these notions, whether or not rooted in fact, are part of a cognitive cluster. This cluster underlies the acceptance of the radical idea of consent as the appropriate “default” approach in private ordering.

In our review of these justifications, we also note and offer critiques. Many of these criticisms have been explored extensively in other contexts, under labels such as “market failure.” We do not claim originality in setting them out, but we do believe that it is time to offer them again. More

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<sup>45</sup> Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. OF COMPLEX LITIG. 1, 4 (2012).

<sup>46</sup> *Id.*; S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?* 29 ICSID REV.-FOREIGN INVESTMENT L.J. 690 (2014).

importantly, we combine them with the cognitive and neuroscientific evidence of the kind set out in Section IV. This combination supports our core argument that American law would benefit from a more nuanced concept of consent.

### *A. Morality and Philosophy*

First, theorists offer moral and philosophical justifications to support unrestricted consent. In this regard, consent often translates, in the context of a bargain, to serve as a promise. The concept that “my word is my bond” has deep resonance in everyday morality, and not just in the United States and other European traditions.<sup>47</sup> It has application across all segments of society. Its Latin version, “dictum meum pactum,” has served as the motto of the London Stock Exchange.<sup>48</sup> The *Stanford Encyclopedia of Philosophy* recognizes, “Few moral judgments are more intuitively obvious and more widely shared than that promises ought to be kept.”<sup>49</sup> The faithfulness to a mistakenly given, or even predatorily extracted oath, even in the face of a disastrous cost, often has a heroic status in literature, and is rooted deeply in Western cultural history, as evidenced by *The Saga of the Jomsvikings*.<sup>50</sup> The religious faithful, including the Promise Keepers,<sup>51</sup> have built huge movements that view promises as devotions to

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<sup>47</sup> MARTIN HOGG, PROMISES AND CONTRACT LAW: COMPARATIVE PERSPECTIVES (2011).

<sup>48</sup> *Our History*, LONDON STOCK EXCHANGE, <http://www.londonstockexchange.com/about-the-exchange/company-overview/our-history/our-history.htm> (last visited Apr. 5, 2015).

<sup>49</sup> Allen Habib, *Promises*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 4, 2014), *archived at* <http://perma.cc/EPV7-2UPV> (provides a useful expansion on the necessarily terse summary provided here); *see also*, HOGG, *supra* note 47.

<sup>50</sup> Lee M. Hollander, *The Saga of the Jomsvikings*, (Siguður Nordal & G. Turville-Petre eds., N. F. Blake trans., 1962), *archived at* <http://perma.cc/T3VA-KH7C>.

<sup>51</sup> *What*, PROMISE KEEPERS, <http://www.promisekeepers.org>; *see also* Gustav Niebuhr, *Men Crowd Stadiums to Fulfill Their Souls*, N.Y. TIMES, Aug. 6, 1995, *archived at* <http://perma.cc/VJ22-WEND>.

God, if not as sacraments. This simple moral principle that a promise should be kept is a source of the legal idea of binding consent.<sup>52</sup>

More developed ethical theory also honors the principle that promises are binding.<sup>53</sup> Legal scholars have credited the pro-promise keeping elements of Aristotle and Aquinas with providing the intellectual framework for the synthesis of contract law over the eighteenth and nineteenth centuries.<sup>54</sup> The emphasis on a binding exercise of “will” in that philosophical tradition, in particular, may provide the basis for contemporary considerations of autonomy and capacity as key elements in the creation of binding consent.<sup>55</sup> Contemporary philosophy also seeks justifications for the importance of making and fulfilling bargains.<sup>56</sup> In turn, legal scholars have appropriated those justifications.

It should be noted that philosophers have also *critiqued* promise keeping. Hume, for example, reacted sarcastically to religiously based arguments on promise keeping and declared:

I shall farther observe, that since every new promise imposes a new obligation of morality on the person who promises, and since this new obligation arises from his will; it is one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to  
TRANSUBSTANTIATION, or HOLY

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<sup>52</sup> See, e.g., E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998); HOGG, *supra* note 47.

<sup>53</sup> See, e.g., Habib, *supra* note 49; JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

<sup>54</sup> GORDLEY, *supra* note 53 at 3-29.

<sup>55</sup> *Id.* at 7-9.

<sup>56</sup> John Rawls, *Two Concepts of Rules*, 64 *THE PHILOSOPHICAL REV.* 3 (1955); Michael G. Pratt, *Promises and Perlocutions*, *CRISPP: CRITICAL REV. OF INT'L SOC. AND POL. PHIL.*, Jun. 2002, at 93-119; T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998); DAVID P. GAUTHIER, *MORALS BY AGREEMENT* (1986).

ORDERS, . . . where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human nature.<sup>57</sup>

The Consequentialist/Utilitarian tradition in philosophy moves away from the inherent worthiness of bargain keeping to a view of its functionality. Enforceable promises provide a framework within which parties can structure arrangements that have good results. Such a utilitarian approach bleeds over into exactly the kind of functionalism that informs economic analysis and the justification of contracts.

### *B. Economic Justifications*

As introduced above, the principle of a bargained-for exchange between informed, rational, willing actors is central to neoclassical economics.<sup>58</sup> Economists have thoroughly explored this topic and we offer only a rough summary of the economic justifications for enforcing promises.

Some of the arguments in favor of enforcement and support are non-utilitarian. For instance, some theorists assert that the fulfillment and enforcement of voluntary private bargains support personal liberty and autonomy as a general principle.<sup>59</sup> Other validations are directly utilitarian. Binding consent supports exchanges that produce Pareto superiority, where at least one of the parties benefits and neither is worse off. This result demonstrates utility enhancement clear and simple.<sup>60</sup> As Trebilcock put it:

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<sup>57</sup> 3 DAVID HUME, A TREATISE OF HUMAN NATURE pt. 2, § 5 (1738) (emphasis in the original), available at [http://www.gutenberg.org/files/4705/4705-h/4705-h.htm#link2H\\_4\\_0022](http://www.gutenberg.org/files/4705/4705-h/4705-h.htm#link2H_4_0022).

<sup>58</sup> FRIEDMAN, *supra* note 7.

<sup>59</sup> *E.g.*, RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW (2011).

<sup>60</sup> *E.g.*, Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, in MARKETS, MORALS AND THE LAW 95 (1988); *see, e.g.*,



[I]f two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it. Thus, in most exchanges, the economic presumption is that they make all the parties thereto better off, that is, they are Pareto superior.<sup>61</sup>

We note that not all examples of consent as we have broadly defined it here fit fully with the idea of an “exchange.” Nonetheless, we believe that the enthusiasm of neoclassical economics for private exchange rooted in this kind of logic is a powerful element in the radical view of consent.

We also note that Pareto positive transactions might possibly occur without necessarily invoking the ideas of capacity, consent, and obligation that we are examining here. Simultaneous exchange, for instance, does not need any kind of contract with a temporal duration. However, even in the case of simultaneous exchange, the element of voluntariness that maps onto consent is still present as a criterion. Any non-simultaneous exchange needs some kind of guaranty of temporally sequential action to overcome the possibility of first-mover exposure to second-mover defection. Such a guaranty can be variously instantiated in psychology, a physical contraption such as the dual key lock box or classic soda machine,<sup>62</sup> or cultural expectations. Additionally, the availability of enforceable, self-binding rights-creation for others in contract, tort, and property is a powerful tool that opens up space for transactions.<sup>63</sup>

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ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 283 (6th ed. 2012); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 293 (2004).

<sup>61</sup> TREBILCOCK, *supra* note 6, at 7.

<sup>62</sup> *E.g.*, Oliver R. Goodenough, *Values, Mechanism Design, and Fairness*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 228 (Paul J. Zak ed., 2008).

<sup>63</sup> *Id.*

We believe, however, that when the rules for recognizing enforceable bargains incorporate not only the power of legally binding consent, but also the criteria on which that power rests, even greater space for transactions develops. When the rules are modified to require buffered and mitigated consent in light of the human cognitive and informational constraints that underlie transactional reality, vast expanses for creative interaction emerge.

The recognized criteria for making utilitarian, Pareto enhancing exchanges—the likely outcome of private bargaining—are not trivial. While variously stated and enumerated, the criteria may involve: (1) parties with stable, well ordered preferences; (2) choices that are fully voluntary and unconstrained; (3) relatively equal, and ideally complete, information; (4) relatively equal bargaining power and experience; (5) sufficient cognitive capacity to evaluate the transaction and to exercise voluntary control over the conflicting factors and emotions involved; (6) the absence of monopoly power or other distortions of the market; (7) the presence of good faith and absence of fraud in both parties; and (8) a level of consequence for a mistake that is not disastrous to the party.<sup>64</sup> Given the many factors that must come together to create the “perfect Friedman,” if we may call it such, it seems bizarre that philosophers, scholars, and jurists would celebrate unfettered consent as the default state.

One can easily predict the failure to meet all criteria. The likely effect of such failure is that the party with greater knowledge, experience, or power will create exploitative traps for the other party. The bargain becomes partly or fully predatory, and the Pareto goal is purposefully not achieved, at least by one party. Trebilcock summarized this potential when he wrote, “This presumption [that exchange will result in a Pareto superior outcome] is rebuttable by reference to a fairly conventional list of forms

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<sup>64</sup> This list, while not complete, is a composite of factors drawn from a number of sources. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 341 (6th ed. 2012); TREBILCOCK, *supra* note 6, *passim*; SHAVELL, *supra* note 60, ch. 13-14.

of market failure or, in a transaction specific context, contracting failure, which neo-classical economists recognize as inconsistent with this presumption, for example, monopoly, externalities, information failures.”<sup>65</sup> The failure to account for these disabling characteristics reflects a deliberate ignorance of reality for many kinds of markets and transaction realities.

On the other hand, we believe that there are also many sorts of markets and kinds of transactions where the parties possess a sufficient allocation of “Friedman” faculties. When parties possess such faculties, enforcement of the results of unconstrained bargains is sensible, and can be expected, on the whole, to lead to Pareto enhancing results. Many consumer retail transactions fall into this category. Most people will indeed make good decisions on deciding what kind of toothbrush or laundry detergent to buy. Even in these transactions, however, the distorting power of advertising gives the manufacturer some advantage in shaping the preferences of the consumer.<sup>66</sup> High dollar value deals between well-informed insiders in structured markets are likely to meet most of the criteria and to give the intended kind of results. Examples of this range from the deals between film producers and the key service providers in a production, when all are experienced professionals, to transactions for commodities between a regular producer and an established company adding it to a product.

In cases such as these, an un-recallable, fully reliable transfer or release is a critical ingredient in the ability to carry on the business-at-hand expeditiously. In these cases, the most radical version of unfettered consent has a place in a vibrant economy. But even here, the transactions are often, at least partly, structured in advance, through legal defaults, market rules, union minimums, industry expectations, standard forms, etc. Even expert deals are generally not created on a “tabula rasa.” Furthermore, the

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<sup>65</sup> TREBILCOCK, *supra* note 6, at 7.

<sup>66</sup> *I Can't to I Kant*, *supra* note 10, at 729-30 (writing about the possible effects of “aspirational advertising” on youth).

potential for abuse exists here as well, as the sad tale of transactions such as the Bankers Trust's "LIBOR squared" contract of the 1990s demonstrates.<sup>67</sup>

Of course, the real world is often far more "shadowy and lumpy" than the well-illuminated, un-tilted playing field of voluntary interchange imagined by Friedman and others and embodied in the simple or expert transactions outlined above. Even most neoclassical economists will concede this point, depending on how strongly one characterizes the term "often."

While the extreme view of unfettered autonomy to bind by consent may have a place in certain formal market contexts, cognitive limits and informational and power imbalances make a wide, unexamined application of this system inappropriate. New neuroscientific discoveries and behavioral studies change how we perceive "rational" actors. Information relating to developing capacity, declining mental function, sundowning, situational stress, and other factors suggests that even "rational" actors may have trouble accessing knowledge, controlling impulses, and making the synaptic connections that result in optimal bargained-for outcomes.<sup>68</sup> In part, imperfect actors and conditions corrupt consent.

Welcome to the *real* world and the behavioral, neuro- and heterodox economics that seek to describe what really happens.<sup>69</sup> Relational contract theorists and others

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<sup>67</sup> See David M. Rowe, *Risk Management Beyond VaR*, 48 EDPACS: EDP AUDIT, CONTROL, & SECURITY NEWSL., no. 1, 2013, at 1-27. One client, Gibson Greetings, sued Bankers Trust after its plain-vanilla swap agreements were replaced with a LIBOR-squared variant. For a discussion of the Gibson Greetings case, see James Overdahl & Barry Schachter, *Derivatives Regulation and Financial Management: Lessons from Gibson Greetings*, FIN. MGMT., Spring 1995, at 24, 68-78. For legal background on the case, see David M. Lynn, *Enforceability of Over-the-Counter Financial Derivatives*, 50 BUS. LAW., no. 1, Nov. 1994, at 291-337. See generally JONATHAN R. MACEY, DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET (2013).

<sup>68</sup> See, e.g., "Bee Line," *supra* note 1, at 66-78.

<sup>69</sup> See, e.g., BEYOND NEOCLASSICAL ECONOMICS: HETERODOX APPROACHES TO ECONOMIC THEORY (Fred E. Foldvary ed., 1996).

recognize that imperfect conditions, compromised actors, deceptive or manipulative practices, incomplete information, and myriad other factors lead to inefficient results or bad deals by human (and, therefore, imperfect) actors.<sup>70</sup>

Looking at the challenges, we conclude that the circumstances where Pareto outshines predation are better regarded as a *special case* and not the *general case* for establishing the power of consent under the law. There is simply too much potential in too many circumstances for a failure of the criteria of a utility enhancing bargain to justify radical consent as the default choice. It is worth recalling that Pareto is any “rational” player’s *second best outcome*, less desirable than one where the transaction *deducts value* from the other side and adds it to the “rational” player’s account. If the given player can arrange the transaction in such a predatory manner without other negative consequences (such as those that might accrue from social stigma, the law or repeat play concerns), there is all too great a temptation to go for option one to do just that. In such a predatory case, obviously, the Pareto enhancing utility goals of adopting unfettered consent as a default principle will not be met. In fact, just the opposite is likely to be the result.

To deal with this, the law has carved out a significant number of “exceptions” to the general presumptions of radical consent. These exceptions buffer, constrain, or supplement the process of consent and the attainment of a binding promise. Rather than viewing these legal and regulatory interventions as a drag on Pareto optimizing processes—as neoclassical economists are wont to do—in many cases we should regard them positively. They become *Pareto-enhancing cognitive prostheses*, rebalancing the

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<sup>70</sup> See, e.g., Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Ian R. Macneil, *Contracts: Adjustment Of Long-Term Economic Relations Under Classical, Neoclassical, And Relational Contract Law*, 72 NW. U. L. REV. 854 (1977).

inequalities of power and information, or otherwise shoring up the failing assumptions on which a Pareto transaction needs to rest.<sup>71</sup> We argue, therefore, that these “exceptions” should constitute the actual general case. Viewed correctly, we believe, the welfare-enhancing goals of neoclassical economics will be best served by a view of consent based in the reality of human cognitive capacity rather than in a myth of omnipotent rationality and capacity. An acceptance that Pareto-prostheses have a positive role to play in many instances prompts a balanced inquiry into how the law should treat consent.<sup>72</sup>

*C. Combining Economic and Philosophical Justifications: A Rawlsian Exploration*

Another tradition combines economic and philosophical justifications in a contractarian context: the approach to justice espoused by John Rawls.<sup>73</sup> His method involves imagining the rules that would be freely agreed to in advance by parties in the fictional “original position.” A key element in Rawls’s analysis is to suppose that human actors will be differently placed in reality with respect to wealth, power, education, information, and cognitive capacity.<sup>74</sup> Note how this sounds like both the world we in fact live in and the world that creates problems for the abstracted, neoclassical welfare enhancing transaction. In order to set rules for such a reality that will be fair and just, the players are placed behind a “veil of ignorance,” where they know what the inequities will look like, but are ignorant of where they will fall as individuals in that spread of inequality. Sitting in such an original position, the future players are

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<sup>71</sup> It is possible to regard the rules of property, which are generally recognized by even the most libertarian neoclassicist, as such an intervention. *See, e.g.*, EPSTEIN, *supra* note 59.

<sup>72</sup> PETER J. RICHERSON & ROBERT BOYD, NOT BY GENES ALONE: HOW CULTURE TRANSFORMED HUMAN EVOLUTION 240 (2005).

<sup>73</sup> JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>74</sup> *Id.* at 118 et seq.; *see also*, NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 26 (2005).

asked to rationally decide on the rules they want to govern the play once they find themselves in the game. The future players must also choose rules that they themselves cannot waive in the play itself—a step that would defeat the whole exercise.

The story of Odysseus and the Sirens is a useful (if mythical) example of such a binding pre-commitment. The Sirens were creatures with magically captivating voices that used their singing to lure sailors toward them and onto hidden rocks that would sink their ships and drown them all. The course which Odysseus and his band needed to sail would take them within the Sirens' range. Following the advice of Circe, Odysseus had his crew put wax in their ears to make them deaf to the singing. Wishing to hear the beautiful music himself, Odysseus did not use the wax, but had himself tied securely to the mast of the ship. He extracted a promise from all his crewmembers not to untie him, no matter how hard he begged or pleaded. In something like the original position, he was creating a rule to protect himself from the mistakes of his will in the heat of the moment. And of course, once the song was in his ears, Odysseus begged his crew to set him free—which would have led to their destruction. His crew tied him only tighter. He was protected from himself and they from him.<sup>75</sup>

The Rawlsian approach is, of course, a thought experiment rather than a real undertaking. However, we believe that the construction of the kind of buffered legal pathways to Pareto style transactions that we propose here are not only appealing, but also useful. When players do not know whether they will be expert credit card proprietors or non-expert consumers who exist a step away from subsistence, the rules they agree to on credit penalties and bankruptcy will probably involve contract and consent limits embedded in law. They will probably not elect to have rules designed for certain transactions that bind in every circumstance. And when players do not know

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<sup>75</sup> HOMER, *THE ODYSSEY*, Book 12, (Samuel Butler trans.) (c. 800 B.C.E.), *available at* <http://classics.mit.edu/Homer/odyssey.12.xii.html>

whether they will be inexperienced and vulnerable adolescent women, their predatory bosses, or the owners of companies that should safeguard workplaces for young workers, those players will make different elections than if they knew in advance. The law of “consent” that limits the right of such young workers to seek damages from the company might look considerably different from that applied in cases like *Doe v. Starbucks*.

While we have so far examined justifications for consent that focus on particular transactions, the law also needs to take into account other goals in fashioning its approach. Complications to such a rule-making exercise arise from the need to let the young learn from experience, the old to keep making the decisions that are within their fraying capacities, and the rest of us to achieve a significant level of self-determination and autonomy in our lives. The “nanny state” has a bad reputation for a reason, and not every opportunity for a binding commitment has a Siren song consequence. The “nanny state” is arguably the polar opposite of the “Friedman” state, and just as flawed. So how to strike the balance?

We have work to do. A system that allows the rich to extract from the poor in one-sided credit transactions and the experienced to predate on youth just learning to manage their sexuality fails from almost any perspective, utilitarian or moral. We need to do better. We must dismiss the myth of radical consent as the starting point for the enforcement of rules about commitment. Techniques already present in the law and ones that we can propose as new approaches help us to fortify a system of compensation for the “market failures” that otherwise threaten to defeat Pareto.

#### *D. The Challenge of “Autonomy”*

Another source of confusion stems from the idea that radical ideas of capacity and consent are necessary correlates of principles of human autonomy. This presumption sets up a kind of logical trap, in which autonomy is an “all or nothing” property. In such a view, if one wants, for example, adolescents or young adults to have



control of some aspects of their sexuality (e.g. use of birth control or choices over an abortion), one must conclude that they, therefore, have full and binding consensual authority over all aspects of sexuality (e.g. consent to sexual relations with a coercive and deceitful supervisor). Such a perspective is needlessly simple-minded. Analyzing with greater nuance, one understands that “autonomy” (i.e. the ability to make one’s own choices about life) is always contextual. There is no necessary connection between the legal validation of a young person’s decisions about some aspects of sexuality and her legal protection in other contexts.

This contextual approach is particularly important as society seeks to create “learning spaces” within which youth can exercise sexual decision making with a reduced threat of predation. Society’s establishment of “learner’s permits” and “junior licenses” for driving recognizes that adolescents do not have an on/off switch for competence behind the wheel. Why expect it in other aspects of life?

Similarly, one can recognize the capacity of the elderly to make certain binding decisions in the moment, and still protect or buffer the decision making of seniors in other contexts. Factors such as the import of a matter, time of day, access to advisors, opportunities to change the mind, and physical and mental health can make all the difference in the quality and integrity of a decision. All of us face circumstances in which we need a bit of help or protection in making important decisions. None of that is inconsistent with any but the most simple-minded and absolutist view of autonomy.

This understanding of human limitations is not just a common sense observation. Cognitive neuroscience is linking up with traditional psychology to provide us with detailed knowledge of decision-making processes in a wide variety of populations that allows jurists and others to take a more nuanced approach.

#### IV. THE NEUROSCIENCE AND PSYCHOSOCIAL STUDIES OF DECISION MAKING BY DIVERSE POPULATIONS AND IN A VARIETY OF CONTEXTS

A wide variety of influences can affect decision making. Science now confirms the effects of certain factors such as age, financial indebtedness, medical condition, and stress. For example, many jurists who advocate for children have used the neurobiological and psychosocial evidence of adolescent development to show how teen decision making is different from that of adults.<sup>76</sup> Scientists have explored decision making in other situations to show how context affects how people actually make choices, sometimes in ways congruent with the so-called rational actor model and in others divergent. An examination of some of these situations and the related scientific studies sheds light on how people experience altered mental processes and how those processes may influence their decisions.

##### *A. Neuroscience of Decision Making*

Neuroscience is that branch of biology that investigates the physical processes of thought and behavior. Its fundamental premise is the belief that an understanding of these physical attributes of structure, electrical activity, and chemical interaction will contribute to an understanding of the cognitive outcomes they help to produce.<sup>77</sup> At its best, neuroscience engages in a conversation with the more traditional approaches of psychology, economics, and other social sciences to help confirm some existing knowledge, contradict other elements of received wisdom, and generally illuminate the kind of inquiry we are engaged in here. Indeed, the field of neuroeconomics has come into being precisely to integrate these findings into the insights from other branches of

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<sup>76</sup> See, e.g., *The Neurobiology of Decision-Making*, *supra* note 1, at 502.

<sup>77</sup> E.g., Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. SOC. SCI. 61 (2010).

economic studies—including those of the neoclassical school. As Cambridge neuro-psychologist Michelle Baddeley expressed it: “[n]euroscientific evidence can help us to understanding the roles played by socio-psychological factors in economic decision-making and—developing ideas from psychology, evolutionary biology and neuroscience—neuroeconomists argue that understanding brain organisation and function can help us to understand economic and financial behaviour.”<sup>78</sup>

It is not within the scope of this article to summarize or critique the tools and methods of neuroscience. Some aspects are broadly accepted as settled science; others are open to greater concern. Taken together, however, neuroscientific findings provide significant evidence for a more nuanced model of cognitive capacity than that produced by the simple assumptions of neoclassical economics. As Baddeley summarized in the abstract to one of her works:

Typically, modern economics has steered away from the analysis of sociological and psychological factors and has focused on narrow behavioural assumptions in which expectations are formed on the basis of mathematical algorithms. Blending together ideas from the social and behavioural sciences, this paper argues that the behavioural approach adopted in most economic analysis, in its neglect of sociological and psychological forces and its simplistically dichotomous categorization of behaviour as either rational or not rational, is too narrow and stark. . . . In understanding the mechanisms affecting economic and financial decision-making, an interdisciplinary approach is needed which incorporates ideas from a range of disciplines

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<sup>78</sup> Baddeley, *supra* note 9, at 286.

including sociology, economic psychology, evolutionary biology and neuroeconomics.<sup>79</sup>

Other neuroscientific reviews of decision making suggest a similar need for nuance of the kind we argue for here.<sup>80</sup> Factors cited as increasing or diminishing the capacity to make “correct” decisions of the kind anticipated from a “rational” economic actor include the presence of stress,<sup>81</sup> emotional arousal,<sup>82</sup> and help, training, and experience.<sup>83</sup>

Experience is not just a matter of abstracted knowledge. One widely considered model for certain kinds of decision making suggests that the brain undertakes “neural value computations”<sup>84</sup> comparing the outcomes of taking or refraining from a particular action. The formation of the value assessments which underlie such a comparison, however, have been modeled and observed as iterative processes, built from repeated experience with taking the choice in question.<sup>85</sup> Such findings support our conclusion that the model of radical consent does disservice to those without experience, such as adolescents in matters of sexuality and most of us in the face of rare and unfamiliar transactions, such as the purchase of automobiles or houses. Disclosure, while useful, is not necessarily an antidote to

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<sup>79</sup> *Id.* at 281.

<sup>80</sup> *See, e.g.*, Nasir Naqvi et al., *The Role of Emotion in Decision Making: A Cognitive Neuroscience Perspective*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260 (2006); Michael L. Platt & Scott A. Huettel, *Risky Business: The Neuroeconomics of Decision Making Under Uncertainty*, 11 NATURE NEUROSCIENCE 398 (2008); Daeyeol Lee, *Decision Making: From Neuroscience to Psychiatry*, 78 NEURON 233 (2013); Christian C. Ruff & Ernst Fehr, *The Neurobiology of Rewards and Values in Social Decision Making*, 15 NATURE REVIEWS NEUROSCIENCE 549 (2014).

<sup>81</sup> *E.g.*, Katrin Starcke & Matthias Brand, *Decision Making Under Stress: A Selective Review* 36 NEUROSCIENCE AND BIOBEHAVIORAL REVIEWS 1228 (2012).

<sup>82</sup> *E.g.*, Nasir Naqvi et al., *supra* note 80.

<sup>83</sup> *E.g.*, Johannes Schiebener et. al., *Supporting Decisions Under Risk: Explicit Advice Differentially Affects People According to Their Working Memory Performance and Executive Functioning*, NEUROSCIENCE OF DECISION MAKING 9 (2013).

<sup>84</sup> Ruff & Fehr, *supra* note 80, at 549.

<sup>85</sup> *E.g., id.*; Lee, *supra* note 80.

the knowledge that brains seemingly need to acquire through trial and error. As we have argued, law needs to create relatively safe opportunities in which to gain such experience—the “learner’s permit” approach has neurological validity.

The remainder of Part IV takes a closer look at the results from neuroscientific and psychosocial studies in four specific contexts of decision making: anger, organ donation during times of grieving, stress and the elderly, and consumer acceptance of CTAs. While explicitly anecdotal, together they provide a useful sampling of the scientific inquiries that are forcing a reconsideration of the simplified psychology of neoclassical economics.

### *B. Anger and Decision Making*

Criminal law has perhaps always recognized the role of emotions in decision making. The “heat of passion” is a legal phrase that describes the enraged mental state of one accused of a crime. In some criminal cases, emotional rage constitutes a defense to disprove a required mental state, *mens rea*, such as premeditation. It can, thereby, effectively reduce a charge from, for example, homicide to manslaughter. For the defense to be applicable, however, the perpetrator’s act, the *actus reus*, must have occurred immediately after the rage prompting event. So, for hundreds of years at least, the law has recognized the influence of anger on “rational” decision making (or the lack thereof).

Recent psychosocial studies explore the influence of emotion on decision-making behavior. One study explored anger and decision making regarding tortfeasors.<sup>86</sup>

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<sup>86</sup> Jennifer Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCH. BULL. 563-74 (1998), available at <http://faculty.haas.berkeley.edu/tetlock/vita/philip%20tetlock/phil%20tetlock/1994-1998/1998%20Sober%20Second%20Thought....pdf> (last visited April 5, 2015).

Subjects in a lab viewed an anger-inducing video and then made decisions on unrelated fictional tort claims involving negligence and injury. Subjects who viewed the anger-inducing video, as predicted, made more punitive attributions about responsibility than did those subjects who viewed a neutral emotion prime.<sup>87</sup>

Researchers found that these results changed when subjects knew that they would be held accountable and were asked to explain their decisions to experts whose views they did not know. When subjects knew they would be held accountable for their decisions in the tort cases, they were better at managing the effects of anger on their decisions. They still felt the anger but subjects judged the tortfeasors less harshly. Interestingly, subjects who viewed the neutral prime also made less punitive attributions when they knew they would have to explain their decisions to an expert.<sup>88</sup> The results of this study prompted the researchers to conclude, “The punitive carryover might represent a form of misattribution; people apparently do not recognize the true determinants of their judgments.”<sup>89</sup> The scientists added, “[p]erhaps the most important implication for affect judgment research is that social/structural relationships moderate the otherwise recursive relationship between blame cognitions and anger.”<sup>90</sup>

If the knowledge of individual accountability can temper the effect of an anger response on judgments then law arguably has a role to play in the mediation of emotions on decision making generally.

### *C. Decision Making About Organ Donation By Grieving Relatives*

Like anger, grief is another emotion that people recognize has an effect on decision making. Rational decision makers might disagree about the decision to donate

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<sup>87</sup> *Id.* at 568, 570.

<sup>88</sup> *Id.* at 568.

<sup>89</sup> *Id.* at 570.

<sup>90</sup> *Id.* at 572.

a deceased loved one's organs. Religious views, interest in the advancement of science, and other factors influence the decision. However, stress and grief also play a role in this decision-making process.

In one study, researchers noted that some family members might opt for organ donation to relieve their pain and suffering. Others sought to "buy time" with sustained life support. These individuals retained the hope for their loved one's recovery or wanted more time to adjust to the death and to say goodbye. Those who declined donation might have done so to protest the injustice of their loss. Some declined donation in protest or as a refusal to accept the loss of their beloved.<sup>91</sup>

Several factors contributed to affirmative decisions to donate. First, the will of the decedent to donate, sometimes expressed in legal declarations, made the decision easier for grieving loved ones.<sup>92</sup> The decedent's desire did not always control, however. When family members reached consensus, donation was more likely to occur. When family members disagreed, the members who opposed donation tended to prevail. One study's researchers explained:

Reasons for nondonation included fear about the reaction of the family . . . and the wish to avoid conflict. . . . Some family members regarded responsibility for the decision to donate as theirs alone . . . , whereas others declined donation as they were reluctant to assume total responsibility. . . . Compounding family stressors such as multiple losses or communication conflicts also contributed to situations of nondonation . . . .<sup>93</sup>

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<sup>91</sup> Wendy Walker et al., *Factors Influencing Bereaved Families' Decisions About Organ Donation: An Integrative Literature Review*, 35 WEST. J. NURS. RES. 1339, 1348-49 (2013).

<sup>92</sup> *Id.* at 1346.

<sup>93</sup> *Id.* at 1349.

These factors indicate that cooperation and consensus in favor of donation during this stressful period contribute to affirmative donation decisions. This study also suggests that fear and attitudes regarding roles influence choice.

One should be cautious in extrapolating from a study focused on organ donation to understand stress in other situations, often not involving issues of life and death so directly. On the other hand, this study is consistent with findings in broader contexts that stress, grief, conflict, fear, and other similar factors influence human decision makers in ways that put the validity of immediate consent into question. The Federal Trade Commission's decision to target funeral industry practices for particular scrutiny and attention under its Funeral Industry Practices Revised Rule confirms that decision making in the context of grief over loss of a loved one deserves special treatment.<sup>94</sup>

#### *D. Effects of Stress on Financial Decision Making in Aging Persons*

A 2013 report confirms that high financial debt leads to stress, depression, and other negative general health indicators.<sup>95</sup> The related question that arises is whether stress might reciprocally affect financial decision making. A study published in 2014 examined the influence of stress on financial decision making in persons aged fifty and older. Investigators hypothesized that even the stressor of an unfamiliar environment might affect such decisions. Choices that interested investigators included "life-changing decisions about debt in the environment of a financial institution, under perceived time pressure, and making decisions about job-offers in the context of welfare

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<sup>94</sup> 16 C.F.R. § 453 (2015); *see also* FTC, COMPLYING WITH THE FUNERAL RULE (2012), <https://www.ftc.gov/tips-advice/business-center/guidance/complying-funeral-rule>.

<sup>95</sup> Elizabeth Sweet et al., *The High Price of Debt: Household Financial Debt and its Impact on Mental and Physical Health*, 91 SOC. SCI. & MED. 94 (2013).



centers.”<sup>96</sup> Investigators wondered whether stress “effects are substantial enough to merit a change in core models of economic decision-making and ultimately the design of major policy institutions such as welfare mechanisms and regulatory structures for financial marketing and bankruptcy resolution.”<sup>97</sup>

In a laboratory setting, subjects responded to two blocks of financial decision tasks. After the first block, researchers randomly divided subjects into three sets, including one control group. The second group received a series of increasingly difficult IQ test questions administered to prompt cognitive stress. In the third group, each subject experienced an ice-cold footbath, designed to increase blood pressure and other sympathetic nervous system indicators. Subjects then responded to the second block of financial decision tasks. The researchers found:

[E]xposure to stress significantly increases the degree of discounting displayed by individuals, and leads to large reductions in the respondents’ willingness to learn about investment options before making their final decision. . . . [S]tress increases monthly discounting rates by about one third, and reduces the average effort made to learn about risky decisions by about 20 percent. . . . [S]tress [also] increases the degree of risk aversion—the observed differences in risk aversion were however not statistically significant.<sup>98</sup>

Lab research confirms that stress does influence decisions and decision-making processes in ways that significantly

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<sup>96</sup> Liam Delaney et al., *Effects of Stress on Economic Decision-Making: Evidence from Laboratory Experiments*, THE INSTITUTE FOR THE STUDY OF LABOR (IZA) DISCUSSION PAPER NO. 8060, Mar. 2014, at 2, available at <http://ftp.iza.org/dp8060.pdf>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 3.

affect the perception and comparison of the utility of options. Stable, well-developed preferences are among the prerequisites of a voluntary, Pareto optimizing choice. Both cognitive and physiological stressors contribute to the decision task changes.<sup>99</sup>

Other “evidence from lab-based experiments suggests that mood and emotional state can strongly affect individual [financial] decisions in the short run.”<sup>100</sup> Liam Delaney and his team noted that, “the relative weighting of short- versus long-term benefits is critically affected by the physical and mental state of respondents, and strongly influenced by primary impulses such as hunger, thirst and sexual arousal.”<sup>101</sup> Scientists also indicated, “[r]ecent work . . . suggests that poverty can impede cognitive function and the quality of decisions—the results presented in this study suggest that physical or cognitive stress could play an important role in this relationship.”<sup>102</sup> From the Delaney study, researchers proposed, “[m]any real-world financial decisions arguably involve stress at the point of decision and our results clearly suggest that this may lead to fewer exploratory and less future-oriented decisions with clearly negative potential for individual and societal welfare.”<sup>103</sup> Ironically, the very importance of certain decisions may make them more cognitively challenging for the non-expert; buffers and enhancers might improve outcomes in these circumstances.

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<sup>99</sup> *Id.* at 13-14.

<sup>100</sup> *Id.* at 4 (citing Andreas Knapp & Margaret S. Clark, *Some Detrimental Effects of Negative Mood on Individuals' Ability to Solve Resource Dilemmas*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 678-88 (1991)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 15 (citing Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCI. 976-80 (2013)).

<sup>103</sup> *Id.*

*E. Effects of Consumer Apathy and Other Factors  
Regarding Click Through Agreements*

Another recent study focused on the CTAs discussed above in this article.<sup>104</sup> In this study, researchers initially examined why consumers routinely fail to read these contracts.<sup>105</sup> They came to several conclusions about consumer beliefs regarding CTAs. First, consumers believe that “CTAs are too long and that reading them would take too much time and effort.” Second, people think that “CTAs are offered on a take-it-or-leave-it basis such that consumers have no choice but to accept their terms.” Third, nonreaders did not think that CTAs were relevant or applied to them. Finally, “a significant number of participants explained their lack of readership on the basis of simple apathy, which may also reflect the belief that CTAs are irrelevant.”<sup>106</sup>

Having determined many of the reasons why consumers choose not to read CTAs, researchers next investigated if they could address these beliefs and prompt response changes. Specifically, they tested whether a modified CTA might change the default decision not to read or cause readers to spend longer at the task. By counteracting participants’ beliefs, researchers significantly increased their subjects’ willingness to read the agreements. Results also indicated that, “participants spent significantly more time reading the CTA . . . when it was presented in a manner that suggested it was *short* and *skimmable*, that it had *different terms*, that it was *relevant*, and that it *could be modified*.”<sup>107</sup>

This CTA study was limited in that it examined the consent offered by contracting undergraduates in an “online” music website. However, when given the chance to

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<sup>104</sup> See *supra* Part II.C.

<sup>105</sup> Victoria C. Plautt & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 LAW & HUM. BEHAV. 293-311 (2012).

<sup>106</sup> *Id.* at 299.

<sup>107</sup> *Id.* at 305 (emphasis in original).

modify these CTAs, subjects read more of the contract and “often used the modification option to purchase a more desirable contract.”<sup>108</sup> If experimenters can prompt college students to read a CTA, one can imagine how law and sociopolitical policy changes might cure or moderate apathy and hopelessness in other contexts to change decision-making behavior.

### *F. Other Studies Involving Decision Making*

Researchers have only begun to explore the variety of factors that can influence “rational actor” decision making. However, as noted, investigators have examined diverse populations and a variety of contexts. In one study of informed consent for clinical research, scientists found “that empathy and emotion are related to subjects’ decisional capacity and informed consent. Higher cognitive empathic abilities and good emotion recognition were related to increased decisional capacity and higher refusal rates.”<sup>109</sup>

A number of studies focus on decision making by alcohol dependents and recreational or addictive drug users. One study of this set determined that alcohol-dependent individuals made comparatively disadvantageous choices on the Iowa Gambling Task (IGT)<sup>110</sup> and risky choices on the

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<sup>108</sup> *Id.* at 306.

<sup>109</sup> Alexander Supady et al., *How is Informed Consent Related to Emotions and Empathy? An Exploratory Neuroethical Investigation*, 37 *J. MED. ETHICS* 311-317, 316 (2011).

<sup>110</sup> Damien Brevers et al., *Impaired Decision-Making Under Risk in Individuals with Alcohol Dependence*, 38 *ALCOHOL CLINICAL & EXPERIMENTAL RES.* 1924, 1924-1931 (2014). Researchers described the IGT:

In the IGT, participants sat in front of 4 decks of cards that were identical in appearance, except for their labels A, B, C, and D. They were told that the game involved a long series of pack selections and wagers and that the goal was to earn as much money as possible. Participants were informed that each trial would consist of (i) a pack selection and (ii) the turning over of 1 card from the selected pack to reveal the yield. Participants were informed that they were free to switch between

Cups and Coin Flipping Tasks.<sup>111</sup> Scientists suggested that, “alcohol-dependent individuals may be more prone to taking high-risk choices because of their lowered capacity to

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decks at any time, and as often as desired. The net outcome of choosing from either decks A or B was a loss of 5 times the average per 10 cards (referred to as disadvantageous decks), and the net outcome of choosing from either decks C or D was a gain of 5 times the average per 10 cards (referred to as advantageous decks). The total number of trials was set at 100 card selections. The dependent measure for advantageous choice was the number of cards picked from the advantageous decks in each block of 20 cards.

*Id.* at 1926.

<sup>111</sup> The authors described the Coin Flipping Task:

Participants decided whether to accept or reject mixed gambles that offered a 50/50 chance of either gaining a given amount of money or losing another amount. To encourage participants to reflect on the subjective attractiveness of each gamble rather than to rely on a fixed decision rule, we asked them to indicate 1 of 4 responses to each gamble (strongly accept, weakly accept, weakly reject, and strongly reject). The size of the potential gain and loss was manipulated independently, with gains ranging from €10 to €40 (in increments of €2) and losses ranging from €5 to €20 (in increments of €1), resulting in 256 random trials. The dependent measure of the Coin Flipping Task was the participant’s gamble acceptance for 6 computed win/loss ratio that include trials in which (i) potential gain equal the potential loss, trials where potential gain was maximum (ii) twice, (iii) twice point 5, (iv) thrice, (v) 4 times, or (vi) 8 times the amount of the potential loss.”

*Id.* In a lengthy discussion of the Cups Task, researchers explained:

On each trial, an array of 2, 3, or 5 cups is shown on 1 side of the screen, with the possible gain or loss shown on top. This array is identified as the risky side where selection of 1 cup of the total number of cups will lead to a designated number of euros gained (or lost), whereas a selection of the other cups will lead to no gain (or no loss). After participants made the choice, the gamble was resolved immediately, allowing them to experience the consequence of the risky or safe choice.

*Id.*

manage the interference effects induced by immediate, highly salient information in working memory.”<sup>112</sup> Their findings demonstrated that results on the IGT did not recover over time after abstinence from alcohol consumption.<sup>113</sup>

Other similar decision-making studies include research involving at-risk<sup>114</sup> and pathological<sup>115</sup> gamblers, heroin dependents,<sup>116</sup> and recreational and dependent cocaine users.<sup>117</sup> This research on the decision making of substance users and dependents leads to questions about how diet, exercise, and other activities might affect decision-making processes. One study concerning an activity’s influence on decision making found that mindfulness meditation

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<sup>112</sup> *Id.* at 1929.

<sup>113</sup> *Id.* at 1924.

<sup>114</sup> Jon Edgar Grant et al., *Selective Decision-Making Deficits in At-Risk Gamblers*, 189 PSYCHIATRY RES. 115-120 (2011) (suggesting that selective cognitive dysfunction may be present for decision making by at-risk gamblers, even before psychopathology arises).

<sup>115</sup> Anja Kräplin et al., *Dysfunctional Decision-Making in Pathological Gambling: Pattern Specificity and the Role of Impulsivity*, 215 PSYCHIATRY RES. 675-682 (2014) (“PGs [pathological gamblers] exhibited higher risk seeking and an immediate reward focus in the CGT [Cambridge Gambling Task] and, in contrast, comparable strategic planning to the control group. . . . Decision-making impairments were related to more severe delay discounting and, specifically, to increased urgency and less premeditation.”); Wan-Sen Yan et al., *Working Memory and Affective Decision-Making in Addiction: A Neurocognitive Comparison Between Heroin Addicts, Pathological Gamblers and Healthy Controls*, 134 DRUG AND ALCOHOL DEPENDENCE 194-200 (2014) (“Our findings indicate that deficits in affective decision-making shared by heroin dependence and PG putatively represent vulnerabilities to addiction and that working memory deficits detected only in heroin addicts may be identified as heroin-specific harmful effects.”).

<sup>116</sup> Yan, *supra* note 115, at 194-200.

<sup>117</sup> L. M. Hulka et al., *Altered Social and Non-Social Decision-Making in Recreational and Dependent Cocaine Users*, 44 PSYCHOL. MED. 1015-1028 (2014) (finding, in part, that decisions in the social interaction tasks of both cocaine user groups were more self-serving compared with controls given that cocaine users chose higher monetary payoffs for themselves). Researchers observed that only dependent cocaine users made riskier choices on the IGT. *Id.* at 1024.

correlated with a reduction of the “sunk cost bias.”<sup>118</sup> More specifically, participants who regularly meditated were better able to resist the impulse to continue an endeavor once they had already invested (money, time, or effort) in the task.<sup>119</sup>

Another area of research involves examination of the particular decision-making capacities of elders. One study examined the diurnal cycle of cortisol that researchers believe “to be an indicator of one of the main stress-response systems, the hypothalamic-pituitary-adrenal (HPA) axis.”<sup>120</sup> This area of research suggested that chronic stress may accelerate cognitive decline in older adults.

*G. The Person or the Situation: Which Comes First in the Corruption of Consent?*

These studies highlight the question of whether context or the actor may influence or corrupt consent. Margaret Isabel Hall discusses the difference between incapacity and impaired consent. She explains, “Distinguished from incapacity, equity explains impaired consent with reference to the situation or context, rather than the internally generated and fixed state of the individual (the *individual* is incapable; the *situation* is one of undue influence or the transaction is unconscionable).”<sup>121</sup> She acknowledges that individual characteristics, including “declining or fluctuating mental processes of early dementia” are relevant

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<sup>118</sup> Andrew C. Hafenbrack et al., *Debiasing the Mind Through Meditation*, PSYCHOL. SCI. 1-8 (2013).

<sup>119</sup> *Id.* at 6-7. Researchers defined mindfulness meditation as consisting “of focusing on present experience and clearing one’s mind of other thoughts; this is often accomplished by focusing attention on the physical sensations of breathing.” *Id.* at 1.

<sup>120</sup> Joshua A. Weller et al., *Diurnal Cortisol Rhythm Is Associated With Increased Risky Decision-Making in Older Adults*, 29 PSYCHOL. AND AGING 271, 272 (2014).

<sup>121</sup> Margaret I. Hall, *Capacity, Vulnerability, Risk, and Consent: Personhood and the Law, in DECISION-MAKING, PERSONHOOD AND DEMENTIA* (Deborah O’Connor ed., 2009).

to impaired consent but that “[n]one of these factors are, in themselves, sufficient to establish incapacity.”<sup>122</sup>

We are agnostic on the point of establishing a legal threshold of incapacity, especially as it pertains to future decision-making autonomy. However, we make two related points. First, certain situations can clearly influence human mental and physiological responses that prompt “consent.” Second, the legal result of incapacity and impaired consent are the same: voidability of consent (or a contract). If jurists cannot know whether the stressful situation or the individual’s biochemical-psychological response corrupts capacity does it really matter? Evidence concerning individual incapacity and situational forces demonstrates that “radical consent” should not remain the default presumption.

#### V. ADDRESSING THE MYTH OF CONSENT WITH TRADITIONAL AND NEUROJURIDICAL TOOLS

We have argued so far that the model of “radical consent,” which prominent legal economists use for establishing rights and obligations under private law, is poorly matched to the task of creating just and optimal results in many cases. We have also advocated for legal rules that create more nuanced frameworks for transactions and other consent-driven interactions. We have explored the contributions that cognitive neuroscience and related areas of psychology can make to help us understand the kinds of problems humans face when giving legally binding consent. Here we turn to the kinds of traditional and innovative neurojuridical tools that implement more nuanced strategies in the law. For the young, we can seek training grounds for Pareto style optimization. For the elderly, we can design increasing levels of protection that do not depend upon the “on-off switch” of traditional determinations of “capacity.” And for the rest of us, we can fashion domain-specific protections that provide “Pareto prostheses” to aid contextually challenged actors in making

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<sup>122</sup> *Id.*



good choices in a potentially predatory world.<sup>123</sup> Happily, we are not starting from scratch; jurists have already created and incorporated a significant number of such legal protections.

*A. Historical Legal Approaches to the Myth of Consent*

For hundreds of years, the law has recognized that some persons who benefit from autonomous action may not have the capacity to make sound legal decisions consistently. The law has historically accounted for the myth of legal consent by these persons. It has recognized that their capacity could be developing or compromised. One can find legal catalysts that have operated for hundreds of years to address vulnerable actors.

*1. Historical Approaches To Cognitive Incapacity*

Two Restatements of law have long distinguished legal capacity and consent by minors and others. For example, these restatements implement legal catalysts to facilitate “consent” by minors, while at the same time protecting them from their bad or compromised decisions. According to the Second Restatement of Contracts, section 12 (2), “A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby . . . .”<sup>124</sup> This section expresses the legal default. However, it also lists four exceptions, including infants<sup>125</sup> and the mentally ill or defective,<sup>126</sup> who lack the capacity to consent.<sup>127</sup>

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<sup>123</sup> See generally Oliver R. Goodenough, *Governance for Cloud Computing: The Role of Public and Private Rulemaking in Promoting the Growth of a New Industry*, (Vermont Law School Research Paper No. 34-13, 2013), available at <http://ssrn.com/abstract=2342594> or <http://dx.doi.org/10.2139/ssrn.2342594>.

<sup>124</sup> RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981).

<sup>125</sup> *Id.* § 12(2)(b) (1981).

<sup>126</sup> *Id.* § 12(2)(c) (1981).

<sup>127</sup> See *id.* § 12(2)(b) (1981).

Minors and those lacking capacity can still make contracts but they are voidable by the minor or the one with the disability.<sup>128</sup> We allow minors and other vulnerable persons to void their contracts because we fear that unscrupulous adults will take legal advantage of children<sup>129</sup> and the disabled.<sup>130</sup> The rescission right operates as a legal catalyst. It protects minors and the disabled from poor contract choices since these persons (or their guardians) can extract themselves from disadvantageous deals. It also serves as notice to their adult contract partners that they do business with minors or the disabled at their risk. The law does not, however, ban contracting between adults and such vulnerable persons. Minors, elders, and the disabled enjoy the freedom to exercise their autonomous choices and bargain while still protected by the safety net of rescission.

The Second Restatement of Torts, section 892A, similarly addresses capacity and consent.<sup>131</sup> Subsection (2)(a) provides that in order to extinguish tort liability, for example, consent must be “by one who has the capacity to consent.” A comment to this subsection provides:

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<sup>128</sup> See, e.g., CAL. FAMILY CODE § 6710 (West 2014) (allowing minors to disaffirm contracts during their minority or within a reasonable time afterwards); *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981); JEFF FERRIELL, UNDERSTANDING CONTRACTS 603-04 (2d ed. 2010); see also RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

<sup>129</sup> “It is the policy of the law to protect infants against their own mistakes or improvidence, and from designs of others, and to discourage adults from contracting with an infant.” *Ex parte Odem*, 537 So. 2d 919, 920 (Ala. 1988) (quoting 43 C.J.S. *Infants* § 180 (1978)). Some states require that a minor return consideration or benefits received. See, e.g., *Mullen v. Tucker*, 510 N.E.2d 711 (Ind. Ct. App. 1987) (finding that return of consideration was required to void the contract but that failure to do so was not a condition precedent to power to avoid).

<sup>130</sup> *Knowlton v. Mudd*, 775 P.2d 154, 156 (Idaho Ct. App. 1989) (allowing conservator of a woman who suffered from Parkinson’s disease to void a contract amendment because the woman lacked sufficient mental capacity to understand the amendment).

<sup>131</sup> RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979).

If, however, the one who consents is not capable of *appreciating the nature, extent or probable consequences of the conduct*, the consent is not effective to bar liability unless the parent, guardian, or other person empowered to consent for the incompetent has given consent, in which case the consent of the authorized person will be effective even though the incompetent does not consent . . . .<sup>132</sup>

This explanatory comment contemplates that children, for example, may not have capacity. It also stresses the cognitive aspects of capacity. The law provides that parents or other empowered persons can consent for the one lacking competence. How one judges whether the minor is capable remains unexplored and highlights the problematic nature of consent by minors in tort law.

What this brief consideration of consent by minors and the disabled makes clear is that the law functions to allow autonomous choice by vulnerable persons. Arguably, these persons who lack capacity are not truly consenting, hence the myth of legal consent. We permit them to void their consent, however, to minimize the negative consequences of consent that disadvantages them.

We can now see how historical approaches to the myth of consent might assist vulnerable actors introduced above. If we permitted Jane Doe to withdraw her consent to sex, rescind her agreement, she might still sue for sexual harassment or other tort injuries. Horton should have been on notice that any agreement struck with Doe was voidable by Doe. Starbucks would have made clear to its agents and supervisory employees that it would not tolerate “consensual” sexual liaisons at work. While the use of the Restatement might not protect Doe in the first instance, it does offer her some relief for her mistaken bargain.

Similarly, Mrs. Belinky can consent to overnights by her husband. However, he proceeds with the understanding

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<sup>132</sup> *Id.* § 892A cmt. b (emphasis added).

that she can rescind her consent. What protects the Drake Center? It can request indemnification by Mr. Belinky.

## *2. Historical Approaches to Volitional Incapacity*

Some of the parties introduced above suffered not from cognitive impairment but from trouble making choices because of situational stress or a temporary inability to control their behavior. The Second Restatement of Contracts distinguishes between cognitive and volitional incapacity in the context of mental disabilities. Section 15(1) provides:

A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

- (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
- (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.<sup>133</sup>

Mirroring the tort guidance of section 892A, subsection (a) focuses on cognitive capacity. Subsection (b) concerns volitional incapacity, the inability to regulate one's responses in a social context. This second subsection anticipates that, even though some actors may understand the nature of a transaction or conduct, these incapacitated individuals may not be able to control their responsive behavior reasonably.

Comment b. to section 15 notes that various types of mental incompetency exist in varying degrees. It lists several disabilities including "congenital deficiencies in intelligence, *the mental deterioration of old age*, the effects of brain damage caused by accident or organic disease, and mental illnesses evidenced by such symptoms as delusions,

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<sup>133</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1981).

hallucinations, delirium, *confusion* and depression.”<sup>134</sup> In further illustrating volitional incapacity, the comment explains:

Even though understanding is complete, [*an incapacitated man*] may lack the ability to control his acts in the way that [*a*] normal individual can and does control them; in such cases the inability makes the contract voidable only if the other party has reason to know of his condition. Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.<sup>135</sup>

This passage contemplates that when a transaction partner has reason to know of volitional incapacity, the contract will be voidable.

Again, a legal tool, rescission, protects individuals who suffer from volitional incapacity. If the partner has reason to know of the disabled condition, he is on notice that he proceeds with the action at his risk. Most actors know when they are dealing with elders or disabled individuals. Many can ascertain this information by requesting age specifying identification or by the nature of the circumstances. Mr. Belinky knew that his wife was disabled and was willing to take the risk of accusation just to comfort her.

This comment also prompts the question whether some mature and otherwise fully functional adults may suffer from a similar volitional incapacity or “defect.” What about a mourner at a funeral home, a residential consumer buying a vacuum cleaner from a door-to-door salesman, or a

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<sup>134</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. b (emphasis added).

<sup>135</sup> *Id.* (emphasis added).

mortgagee who is about to sign loan documents? As discussed below, the law already anticipates all of these cases.

This very brief review of capacity and consent highlights that the law (of at least two *Restatements*) anticipates many circumstances in which actors may have developing, diminished, or declining capacity. However, with every mature adult, we assume full legal capacity by default. Neuroscientific discoveries relating to developing capacity, declining mental function, sundowning, and situational stress suggest that even rational actors may have trouble accessing knowledge, controlling impulses, and making the synaptic connections that result in optimal bargained-for outcomes. In part, imperfect actors and conditions corrupt consent.

The neuroscience and psychosocial evidence not only bolster historical attempts to deal with human frailties, they also highlight the need for more comprehensive legal responses. The necessary steps to reform are as much conceptual as creative: we need to move from viewing these approaches as exceptions to viewing them as readily available elements in the law's bag of tools. In section B., we proceed with a summary review of a number of the existing tools, not so much to create an exhaustive catalog but to flesh out our argument and prompt further discussion. In section C., we suggest a possible re-framing of consent that may form the basis for a more fundamental change in approach, particularly in the context of a learning period such as adolescence.

### *B. Traditional Tools*

The existing tools can, for the most part, be grouped into two large categories: (1) consent "enhancers" and (2) consent "frames" or "buffers." The enhancers generally aim to balance the information and cognitive capacities of the players.

#### *1. Consent Enhancers*

Many professionals strive to *inform* the more ignorant. Disclosure rules operate in many contexts, from cigarette sales<sup>136</sup> and drug and medical therapies<sup>137</sup> to offerings of investment securities.<sup>138</sup> Many people question the efficacy of disclosure, at least as it frequently plays out in real world practice. Dense legalese, repelling typeface, and other barriers thwart actual engagement and understanding. These hindrances underscore the potential payoffs for transaction players who can induce evaluation failure in their contracting counterparts.<sup>139</sup>

*Education about the meaning of information* is a related goal. An information processing imbalance can be as damaging for a party as an information access imbalance. Enhanced training of players to better evaluate available information might ameliorate processing imbalances. Given the possibility for self-protection that educated consumers can muster for themselves, the American educational system's failure to emphasize financial literacy and related skills is surprising. In a sense, the best way to educate is to create a safe space in which to experiment with decision making for a particular task. We seek to foster this

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<sup>136</sup> 21 C.F.R. §§ 1141.10(a), 1141.12 (2015); see also *Overview: Cigarette Health Warnings*, FDA, archived at <http://perma.cc/Y7HA-XKGB>. See generally Andrew C. Budzinski, *A Disclosure-Focused Approach to Compelled Commercial Speech*, 112 MICH. L. REV. 1305 (2014).

<sup>137</sup> E.g., David G. Adams, *FDA Regulation of Communications on Pharmaceutical Products*, 24 SETON HALL L. REV. 1399 (1994).

<sup>138</sup> 15 U.S.C. §§ 77f, 77g (2014)

<sup>139</sup> OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165 (2011); *Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309 (2009); Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008).

approach in suggesting *legal assent*, described below. As discussed above, neuroscience studies indicate that simple access to information is no replacement for experience that exercises the cognitive neurobiological tools for effective decision making. “Once burned, twice shy” says the proverb, not “once warned, twice shy.” Experience builds judgment in a way that neutral information cannot.

The provision for or even mandated *expert advice* is another technique that can help bridge this information gap. The U.S. Securities and Exchange Commission (SEC) Regulation D adopts this approach in the Rule 506 requirement for the participation of a purchaser representative for unsophisticated, non-accredited investors.<sup>140</sup> These enhancement techniques and others are intended to move otherwise disadvantaged participants closer to the cognitive and informational ideal on which the benefits of consent are premised.

As with many well-intentioned measures, such “fixes” can sometimes have unintended consequences that can make them counterproductive. The cigarette industry, for instance, has been able to successfully assert that the highly visible warnings about the dangers of smoking make the “choice” of smoking a matter of autonomy by the smoker, fending off potential liability for the manufacturer that sells an inherently damaging product.<sup>141</sup>

## 2. Consent Buffers and Frames

The second major set of responses uses embedded “frames” and “buffers” in the law of obligation and consent itself. One approach involves creating un-waivable (or at least hard to waive) *duties on the other party* to avoid taking advantage in a context of consent. *Fiduciary duties* are a classic example of this. A trustee is obligated not to engage in predatory practices with the beneficiary of the

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<sup>140</sup> 17 CFR § 230.506(b)(2)(ii) (2014).

<sup>141</sup> Jack E. Henningfield et al., *Tobacco Industry Litigation Position on Addiction: Continued Dependence on Past Views*, 15 TOBACCO CONTROL iv27 (2006), archived at <http://perma.cc/K8KT-9R9E>.



trust, or with its corpus. The consent by the beneficiary to any “self-dealing” transaction is hedged around with hard-to-satisfy requirements for disclosure and for objective fairness.<sup>142</sup> The law of corporations adopts similar requirements for directors and officers. Under classic law, a self-dealing transaction was presumptively void. Even under “reformed” practice it remains voidable unless specified standards of disclosure, deliberation, and substantive fairness are met.<sup>143</sup> In contract and property law, implied warranties of merchantability, fitness for habitation, and marketable title create duties that buffer against bad decision making and predatory activity.<sup>144</sup>

Other tools for providing contextual granularity to problems of capacity and consent involve rebuttable presumptions, that both protect and provide some flexibility, suitability standards, such as those embodied in SEC Regulation D for Accredited Investors,<sup>145</sup> and waiting periods and rescission rights, as in real estate mortgages in many states.<sup>146</sup> Fraud laws provide a general protection against active misrepresentation as a predatory practice.

The FTC is a particularly prolific source of traditional “exception” style rules. Their regulations create consumer protections in contexts of stress, imbalance of experience, and coercive pressure of the kind we have identified as good candidates for a Pareto prosthesis. For example, FTC regulations address cooling off periods for sales made in homes or at other specific locations.<sup>147</sup> Similarly, another

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<sup>142</sup> Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 (1949); Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property*, 72 ST. JOHN'S L. REV. 43 (1998).

<sup>143</sup> MODEL BUS. CORP. ACT §§ 8.60-8.63 (2008); DEL. CODE ANN. tit. 8 §144(a)(1)-(3) (2014).

<sup>144</sup> *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984); *Lohmeyer v. Bower*, 227 P.2d 102 (Kan. 1951); U.C.C., §§ 2-315, 2-316 (2013); HOGG, *supra* note 47; Wallace Sedgwick et al., *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139 (1964).

<sup>145</sup> 17 CFR § 230.501(a) (2014).

<sup>146</sup> 12 CFR § 226.19 (2014).

<sup>147</sup> *See, e.g.*, 16 C.F.R. § 429 (2014).

FTC regulation addresses deceptive credit practices.<sup>148</sup> Another FTC provision deals with funeral home practices and requires disclosures for specific services and prior approval for certain procedures.<sup>149</sup> Other sections deal with deceptive advertising and labeling of cigarettes,<sup>150</sup> used car sales,<sup>151</sup> telephone and mail order sales,<sup>152</sup> and home insulation.<sup>153</sup> Home insulation is a classic example of an unusual transaction where the consumer has little experience and where the end result will be hard for the consumer to evaluate.<sup>154</sup>

These regulations clearly anticipate the distorting effects of physiological disabilities (nicotine addiction), stressful sales conditions, and other compromising circumstances. They also foresee the possibility of predation by savvy operators who attempt to exploit grieving, stressed, or otherwise compromised individuals. While we applaud most of these rules, we view them as still being part of a pattern of piecemeal response to context-specific concerns. We think it is time for society and its jurists to modify legal defaults more generally to account for the realities of human decision making. And in doing so, they should take advantage of the contributions that neuroscience can make to policy determination and implementation. The following discussion explores how we might develop a cognitively informed set of tools, moving through and beyond traditional approaches to the myth of consent.

### *C. A New Neurojuridical Tool—Legal Assent*

The law has historically addressed both cognitive and volitional incapacity through rescission. It has also dealt

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<sup>148</sup> 16 C.F.R. § 444 (2014).

<sup>149</sup> 16 C.F.R. § 453 (2014).

<sup>150</sup> 16 C.F.R. § 408 (2014).

<sup>151</sup> 16 C.F.R. § 455 (2014).

<sup>152</sup> 16 C.F.R. § 435 (2014).

<sup>153</sup> 16 C.F.R. § 460 (2014).

<sup>154</sup> For a general treatment of FTC rules in consumer protection areas, see *Selected Industries*, FTC, archived at <http://perma.cc/5Z45-XB6Y>.

with bargaining imbalances through traditional consent enhancers and buffers. One can envision other catalytic tools, however, to promote efficient bargains and protect vulnerable actors. For example, *legal assent* offers a new mechanism to advance a bargain through to commitment while still protecting the assenting party. It contests the default approach that assumes highly sophisticated and competently cool, rational actors. *Legal assent carries no presumption of capacity.* Society credits assent with legal relevance because it wants to afford frail, immature, and mentally or emotionally disabled persons the independence, autonomy, and opportunity to practice good decision making. Legal assent operates as a “temporary permit” for legal authority.

Legal assent might work for many classes of compromised persons: adolescents, frail elders, grieving persons, and the mentally challenged. As opposed to medical assent, legal assent when offered by an adolescent, for example, does not require associated parental permission or consent. Similar to consent by a minor under contract law, assent is voidable by the minor.

Assent operates slightly differently from traditional, voidable contract consent by a minor, however. As noted, assent presumes no legal capacity. Moreover, the minor or assenting party may void assent *only with good reason.* Adult abuse, adult exploitation of an unfair advantage, and breach of a duty owed to the minor or to another assenting person, all justify revocation. Additionally, parents cannot void a minor’s assent. Although parents may offer their wise guidance, undue influence by a parent or other adult nullifies revocation. If a court determines that the original decision was, borrowing from family law, in the minor’s or the assenting party’s best interests, it can reject the revocation.<sup>155</sup> On the other hand, if a minor or assenting party successfully voids her assent, a court cannot admit it into evidence or permit discovery on the matter. A criminal

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<sup>155</sup> See *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (explaining the “presumption that a fit parent will act in the best interest of his or her child”) (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

prosecutor might still prosecute an adult who has sex with an assenting minor, however, because the assent operates solely to benefit the minor or the assenting party.

One can see how assent might change the outcome of several cases discussed above. Jane Doe could revoke her assent to sex with her Starbucks manager. Presumably, sex with the manager was not in her best interest. An elderly person who assents to pay for a new roof offered by an unscrupulous door-to-door salesperson may revoke his assent. A grieving person might revoke assent offered for funeral services not needed, beyond the financial wherewithal of the assenter, and extracted in suspicious circumstances.

The world of commerce will not come to a screeching halt with the implementation of legal assent. Honest adults will not have sex with minors or try to sell unneeded services to the elderly and grieving family members. Judges will not permit the abrogation of decisions wisely made in the first instance. The voidability of corporate action in the presence of director self-interest noted above provides a point of comparison for this approach. Legal assent operates to allow the assenting party only to correct an error made in the moment of immature, disoriented, or stressed decision making by a compromised individual. It plays a role in a controversy only when the bargaining party with the superior position contests the withdrawal of assent. It evens the playing field.

## VI. CONCLUSIONS

“Mistakes are the usual bridge between inexperience and wisdom.”

Phyllis Theroux, *Night Lights*

The neoclassical model of radical consent has value for many everyday purchases as well as for sophisticated transactions by savvy, knowledgeable traders and market professionals. However, radical legal consent disadvantages many more common individuals, particularly in unfamiliar or stressful circumstances, and should not serve as the

default legal presumption for most transactional encounters.

We all make mistakes. As responsible adult actors, we must suffer the consequences of many of them. However, the law can and already does anticipate when legally binding consent is tainted by immaturity, dementia, or some other biophysical, mental, or emotional disability.

This article demonstrates that neuroscience and psychosocial studies provide the supportive evidence for dismantling the radical default of un-buffered legal consent. It begins the conversation about how a reconceptualization of legal consent might benefit from the use of *neurojuridical* tools. *Enhancers, frames*, and new mechanisms, such as *legal assent*, work to even playing fields and optimize mutually beneficial transactions. Pareto prostheses have existed for hundreds of years in law. We should give them full recognition for the valuable service they do for so many individuals. As youth develop wisdom, as elders and others adjust to their changing capacities, the law can facilitate autonomous or semi-independent participation in commerce and legal transactions.

Legal capacity is not an on-off switch. It is time to recognize that reality and find new ways to illuminate the field lights for more Pareto-seeking legal players.

