**Contract**: A contract may be defined as an exchange relationship created by oral or written agreement between two or more persons containing at least one promise, and recognized in law as enforceable.

**Remedies**

-Restitution, Reliance, Expectancy, Equitable remedies

**Goals in Awarding Contract Damages – How we get to expectancy**
- To put the non-breaching party in their expectancy position, so far as money damages can satisfy. This differs from tort law. Here, we are attempting to put the non-breaching party where they would have been. In tort, we are looking to put the harmed party into their pre-injury position, so far as money can satisfy.

**Construction Ks**
We see that this causes a dispute early with regard to the meaning of expectation in construction contracts. Two Possibilities:
- Cost of completion
  - Groves majority
  - Wilks (always C.O.C. If “special significance”). Also Restatement “Monumental Fountain”
- Diminution in value – FMV(performed) – FMV(actual)
  - Groves dissent (when out of proportion)
  - Peevyhouse (when disproportionate)

**Public Works Ks**
- We see that in public works contracts, we always give cost of completion because there is no market value. This keeps with the expectancy principle as a goal in awarding contract damages.
- Generally, we do not want to place a party in a position greater than their expectancy position, so no punitive. We do not want to favor one party over another. The questions posed here is how we value expectancy.
- We also have the notion of efficient breach that is raised in Groves and other cases. The idea is that no one is going to trade two dollars for ten dollars. Should we punish breach? This is a big question that must be answered before we can award contract damages.
- We also see in rockingham that to put in expectancy position need to give lost profits and expenditures. Anglia says must choose one or the other, but Rockingham court is right. Expectancy encompasses reliance.

**Sale of Goods Breached by Seller**
- When there is a breach of a contract for the sale of goods, we see two possibilities, as well:
  - Market price – K price (at time and place of delivery)
  - Price of sale to X – K price
- The second option punishes breach, while the first option does not. The court in Acme Mills elects the first option, and this is generally the accepted remedy.

**Sale of Goods Breached by Buyer**
K price – Market price (converse of above)

**Contract to Buy Land**
- The law favors specific performance; there is a presumption that land is unique.
- Where previous owner, construction company, etc. removes a natural part of the land prior to the buyer taking possession (making a tort case unavailable), measure of damages is market value of the property removed – the costs incurred in removing it from the land (not the market price – we want to remove the value added by the D's work

**Limitations on Those Expectation Damages**
- You can't get the whole K price if you don't have to finish the work, but you still get to recover for your overhead expenses.
- You can't recover money you were able to make because of the breach
- You can't recover money you could have made in the same line of work with reasonable effort
- You can't recover a bunch of money you rack up in damages unnecessarily when you set your expectancy value (replacing a breaching employee, for example)
- A lot of these are about two things: we're not trying to punish, and since Ks is about the economy at its core, we're trying to grow the economy (the first is really a function of the second).

**Breach of Construction K by Buyer – We could make them finish the deal, but we don’t.**
Three ways of expressing the remedy:
-cost until breach + profits
-value of what P was to receive – value of what P is still to perform
-contract price – expenses saved.
We see that can recover their expectancy through lost profits, but can't get entire K price. Avoids economic inefficiency of making them go through with deal no one wants. (Rockingham)

**Breach of K to Provide Services**
-K price – expenses saved (overhead costs are NOT saved – they must be recovered and are here) (Leingang)

**Breach of K for Hybrid K of Labor and Materials**
-measure of damages in Kearsage Computer, data processing, is **contract price – expenses saved** (note: overhead costs are NOT saved, as in Leingang). Gains made on other transactions following breach NOT deducted from the recovery unless could NOT have been made had there been no breach (hybrid, involves a sale of goods and personal services).
-Generally, when the person could not have made the other income but-for the breach.

**Doctrine of Avoidable Consequences:** A person injured by a breach of contract can recover only those losses that it could not have avoided. A person cannot recover for those losses that with reasonable efforts it could have avoided. In Rockingham, this means stopping the project that no one wants. In Parker, this means making reasonable affirmative efforts to find comparable employment. Do these conflict? No, the doctrine of avoidable consequences is an **economic efficiency doctrine**. We want to do what is efficient, whatever that means in the particular circumstances.

**Breach of Employment K by Employer**
-measure of damages is K price – amount employer proves could have been saved with reasonable effort from other employment. Doesn't matter if she doesn't make reasonable effort. Must be substantially similar. (Parker)
-notice doctrine of avoidable consequences applies here, except the non-breaching party must make a reasonable attempt to mitigate; with construction contracts, they should stop working. Economic efficiency doctrine!
-Should we deduct if they take totally different work?
-Less clear, but if you agree with R for doctrine of AC, then should not deduct. Encourage productivity. Economic efficiency doctrine!
-If we want to be consistent with the rationale for the doctrine of avoidable consequences, we should deduct! When we have a choice between promoting economic efficiency and giving a windfall to a party that surpasses their damages, Ks should put society first. We wouldn't have K law if we didn't care about agreements' effects on society, because we have seen that we're not concerned with morality. But we see this tension; some courts worried about the moral component of a promise.
-On the other hand, if we allow deduction, this throws off the balance the theory of efficient breach. If we say that, normally, a breach is efficient if it benefits the breacher even after he has paid the damages of the seller, now the breacher

**Collateral Source Rule**
-From tort law; denies to tortfeasor reduction for compensation received by P from other sources, often insurance. Think about how this would arise

Dont' want to punish taxpayers for actions of breacher)
will often have an incentive to breach when it will benefit him, leave the P in expectancy, but punish those who pay into the collateral sources of funds, often taxpayers. If efficient breach is a good thing because it's good economic policy, and if it's good economic policy because it grows the economy and positively influences parties who are peripheral to the deal (other citizens who pay for the courts that enforce contracts, fundamentally, on their behalf), then if we deduct, efficient breach is no longer good economic policy because it punishes those it is meant to benefit (other citizens who are peripheral to the deal, and who pay for the court system that enforces contracts). This is very problematic, and it is a good reason to NOT deduct for collateral sources of income, even if on its face it might look merely punitive.

**Breach of Installment K by Buyer**
-measure of damages is Mkt. Price at time of each installment – K price. (MO Furnace)
  -Bad decision. They did what others had done and D normally would want them to do. Also, seller has opportunity to show it could have been mitigated. If they can't, then they should be stuck with this since they breached.
  -G: this is just a BAD rule. Remember, here P does enter substitute K, unlike in other cases.
  -UCC now says should enter a new forward K
-P does the economically efficient thing: they get back to work with a new forward K. We certainly don't want them to sit around and sue on the price of the K, as we have seen in other cases. This is a bad decision, and the correct decision would have put this on the breacher, not because we want to be punitive, but because we should choose economic efficiency over the breacher, when given the choice. This is the primary objective of K law (a body of law about economic exchanges), and some damage to the breaching party should not get in the way. Don't confuse choosing to make an economic impact rather than choosing to lessen the breacher's damages with being punitive – we're talking about different principles of K law here.
  -Just because, in this particular case, it exacerbated the damages instead of mitigating them, we should care more about the rules than the parties. This was, then, a bad rule which would have bad effects.

**When do you have to mitigate?**
-In breach of K for delivery of goods, don't have to mitigate until there are damages to mitigate. No obligation to find substitute until date of delivery – don't want to turn this into benefit for repudiator (Reliance Cooperage)
-UCC says seek replacement in good faith without unreasonable delay (Oloffson, Cargill, Cosden). UCC differs from Reliance.
-Again, we're choosing economic efficiency, but this time over the non-breacher. We don't care as much about the parties in K law as we do about the economic impact of the rules.

**When can you bring suit?**
-In case of anticipatory repudiation of K for goods or services on given date, non-breaching party can bring suit immediately. Do not need to wait for date of delivery or service. (Hochster).

Missouri Furnace is different because a new contract does not mitigate damages, it exacerbates them.

In MO, the court doesn’t consider mitigation at all. They just say the hard rule is that plaintiff is entitled to the difference.

**Inexhaustible Supply**
-If seller has inexhaustible supply, measure of damages is profits (they're losing the volume)

**Foreseeability – A limitation on the expectancy principle**
-P is only liable for damages that were reasonably foreseeable at the time of the K. (Hadley)
-We see a limitation on the expectancy principle here. Expected it delivered in 1 day.
-If McD's is going to sell a deep fryer to a vendor, it's foreseeable that they will form a K to resell it. If McD's breaches, they are liable for direct damages plus the foreseeable damages
-Where dry cleaner had some particularly lucrative Ks, couldn't recover for those since weren't foreseeable. (Victoria Laundry)
  -doesn't have to be the most foreseeable - “not unlikely,” “liable to result,” and “a serious possibility” attempt to express it.

  -Look up special damages and general damages
  -Look up consequential damages

Limits on Foreseeability:
-If out of proportion to consideration agreed to be paid and no express agreement or evidence that breacher tacitly consented to be bound for more than ordinary damages, not liable. Seems to scale back foreseeability. (Lamkins)
-Can't recover for emotional distress, although it is foreseeable. (Valentine)
Reliance and Restitution
- Prevailing theory of contracts aims to give expectancy.
- Damage rules protect both the expectation and the reliance interests. The defaulter must account for “gains prevented” and “losses caused.” The point of accounting for the “losses caused” is because the non-breaching party will normally have acted in reliance on the contract.
- This section asks whether there are alternatives to the full enforcement of expectations through a money substitute for the promised performance.
- There are cases where it is difficult to give plaintiffs their expectancy. Expectation damages will often make less sense the further one gets from a commercial setting. Also, sometimes expectation damages are simply unavailable or, for some reason, unattractive to the non-breacher or unacceptable to a court.
  - Thus, a turn to other definitions of “compensation.”

Reliance
- Sometimes P cannot be placed in expectation position.
- Will award damages compiled after the signing of the K because the non-breacher was relying on the contract when compiling those damages.

Money Spent in Reliance After K Formation
- Dempsey says can recover for reliance spent after formation of K, but only for damages that wouldn't have been incurred (ex. not president's salary or other salaried employees)
- However, Security Stove says can recover for president's salary. Leingang also says this. Dempsey is in disagreement.

Money Spent in Reliance Before K Formation
- In dempsey, cannot recover for reliance before entered into the K
- However, Anglia says can recover (they couldn't find replacement, say he took on the previous expenditures when he signed on)

Restitution
- When P confers a benefit on D and D unjustly retains the benefit, P can recover the value of the labor and equipment at the time they were furnished (regardless of K price). This is not recovery on the K. (Algernon Blair)
  - Notice that this is available even when there is a suit on K available.
- We need a benefit conferred. If no benefit conferred, cannot recover in restitution. Need to sue on the K for breach when no benefit conferred (can be problematic when K unenforceable and try to get restitution – can’t do it)
- Can’t recover more than K price in restitution (Oliver) – is this true?? When it's the breaching party seeking restitution.
- Britton says can’t get more than the K price when it is the breaching party seeking restitution. The K price represents the expectancy of D, the party who has a claim in contract. So we handle this all in one swoop. K price – damages to non-breacher accomodates restitution rights and expectancy rights of the various parties.
- In Algernon, where D is the breacher and P has a claim in contract, can get more than the K price (pro-rated, at least)
- Employee who breaches an employment K can recover in restitution. K price – damages to non-breacher, not to exceed the K price. This is because goal in K is expectancy, or 100% of K price. System of K prevails over system of restitution. (Britton)
  - Britton says that D should not get more (in the value of the work) by someone who enters performance than he would have gotten in a suit on the K if performance was never even started (trivial damages). Here he’s getting 5/6 of the value of what he bargained for, essentially for free. (me: why is it better to start than to not start? It seems like most would prefer to go through the lawsuit at the beginning, rather than in the middle of the job they wanted done.)
  - Also, notice that more than one basis for obligation may exist. In Algernon, could sue on the K or in restitution. (Also, sometimes will be basis in restitution and promisory estoppel). They sue in restitution here because they signed a bad deal and Algernon wasn't paying. They would have saved money by paying here. This is interesting, because Oliver tells us K disappears when elects to recover in restitution, but G says still relevant because it explains why retention was unjust. Courts have struggled with this (why they should get more in restitution than D agreed to pay)
  - An expectation of payment is essential (Hertzog)

Enforcement in Equity
When no adequate remedy at law. In determining whether remedy in damages would be adequate to protect expectation interest, consider: difficulty in proving damages with reasonable certainty, difficulty of getting a suitable substitute performance by money award, and likelihood that award could not be collected. (Restatement)
- So, Dempsey is a case where ordinarily would have been available, but would be personal service. Do cases where P gets
screwed because no way to measure damages usually occur this way? Seems like, probably, yes.

**Specific Performance**
- When adequate remedy in damages, like in Van Wagner where the spot was invaluable but owner of board was just leasing it out, a quantifiable damage, no SP. “Unique” not a magic door to SP; there is distinction between physical difference and economic interchangeability.
- Where no remedy at law, even with goods, can get SP, often an injunction (don’t compel personal services). (Curtis Bros.). Usually, will be remedy with goods, but when there isn’t, this is an option.
- Presumption that no adequate remedy at law with real property --> SP. No two pieces of property alike, can’t get replacement
- Courts will not order the impossible, like ordering seller to sell something they do not have (Intermountain Chevrolet).
- If item is “unique,” can get SP. We see in Dallas Cowbows that when he’s the best they could get, this qualifies. Doesn’t have to be “unique” generally, just for K purposes.
- Won’t order SP in a construction contract where no immediate remedy at law (Northern Delaware, can sue after K complete).

**Personal Service Ks**
- Generally, SP not awarded in personal service Ks, although she just wants a receiver, G says bad decision. Other courts would allow this. (Fitzpatrick)
- Madden shows us a receiver is possible in SP where parties don’t want to be together
- Exception when the person has “unique and exceptional skill or ability in area of expertise,” some courts will order SP. (Pingley)
- However, Brackenbury awards SP in personal service K. This did NOT work well. Most won’t do this; don’t want to force them together, and no way to compel performance of offeree (who, unlike offeror, is providing a service).

- If item is “unique,” can get SP, regardless of personal service nature. We see in Dallas Cowbows that when he's the best they could get, this qualifies. Doesn't have to be “unique” generally, just for K purposes.
- If no remedy at law, courts can order specific performance of a negotiation to agree, with the threat of appointing a “special master” or the parties submitting themselves voluntarily to arbitration if they can't agree. (City Stores)

**Noncompete Pledges –**
- Courts will reasonbly alter overbroad noncompete pledges when was drafted in good faith. If wilfull overreach, will be unenforceable. There is no adequate remedy in damages for breaches of noncompete pledges. Thus, courts will enforce them by injunction, an equitable remedy.

**Arbitration**
- Courts will generally enforce rulings of arbiters when assented to by both parties in K, even if he orders something that is impossible as a matter of fact (Grayson-Robinson, D clearly couldn't raise money, but court orders SP anyway).

**Grounds for Enforcing Promises**

**Formality**
- An oral promise is not enforceable without reliance or consideration (Kadimah, needed will). Must actually gift it or put it in a will. Promise won't cut it.
- Anything more relevant for final?

**Exchange Through Bargain**

**Consideration**
- Legal detriment: If a person gives up a legal right or freedom in exchange for a promise to give, this is valid consideration. Refraining from cursing, drinking, gambling counts (Hamer)
- Benefit to the promisor OR detriment to the promisee, plus mutual reciprocal inducement.
  - Either will suffice.
- determine which party is which by looking to which promise we are examining the enforceability of.
- A promise can serve as consideration for another promise.
- Not enough that it induces a response; need **mutual, reciprocal inducement (bargain)**. Moral obligation is not enough (Fischer)
- The consideration doesn't have to be the primary motive, enough that it's part of the motive (Simmons)
-Courts will not look into the adequacy of the consideration
  -Schnell says there is an exception when for things of fixed value (ex. unequal sums of money)
-If the particulars of a K are illegal, it is unenforceable (Duncan)
-Forebearance to bring suit can constitute consideration if: P is asserting the claim in good faith (doesn't know it has no basis), the claim isn't completely without substance (wouldn't be thrown out of court; doesn't mean would win). (Duncan, Military College)
  -We see here that we encourage settlement so long as it doesn't promote extortion.

-Can have consideration if a person is aware of an offer of a unilateral K but it isn't his primary motive in taking his action. (Simmons)

**Promises Grounded in the Past**

Mills says no consideration when we have benefit to the promisor, detriment to the promisee, but no mutual reciprocal inducement. Cannot enforce the father's promise to pay.

**Material Benefit**
-Webb says moral obligation with material benefit and a subsequent promise is consideration.
-However, Harrington disagrees and says moral obligation, even with material benefit, can't serve as consideration for subsequent promise.
-If someone does work not originally contracted for and receives a subsequent promise to pay for it, enforceable K since material benefit conferred with moral obligation (according to Edson)
-Even if original K unenforceable (ex. Doesn't comply with SOF), where there is moral obligation and a subsequent promise to pay it, enforceable contract.

-Also, can enforce when there is a subsequent promise to pay a now unenforceable debt. The argument for this is that lack of an obligation to pay isn't within the rationales for the bars (SOL, minors, etc., where there is some other consideration, ex. Fading memories, competency to contract, etc.). In other words, it's not elimination of the claim, but the legal right to sue on it. New promise dispenses with the bar. This is the more restricted view of enforcement of promises grounded in the past – we enforce because there was, at one time, a legal obligation. In Webb, we do not have a legal obligation in the past.
  -The difference here is that there has been quid pro pro, good consideration, and the law has barred enforcement for public policy reasons unrelated to the contract that existed between the parties. They should be free to revive what was a valid contract.

-Note that “material benefit” is very ambiguous. One could have found this in Mills, saying father got comfort and promisee spent effort caring for the son. Mention this issue!
  -Rationale in Mills is that in SOL cases, there has been benefit to the promisor and detriment to the promisee, and says Mills is different. It really isn't, however, in the language of legal detriment. (Mills does not address inducement, but should certainly address it on exam).
  -Webb says that material benefit must be to the promisor and not another party, but it's ambiguous; could certainly argue that it is both. Webb formula: Material benefit + moral obligation with no inducement = valid consideration. (This is an exception to requirement of bargain, Webb is saying!)
  -Notice that the Harrington court says there is NO exception to the bargain requirement, not even material benefit.
  -Most promises to give don't include a past material benefit, and these are unenforceable. While it is hard to fit the material benefit cases into K law, they are responding to a real issue: namely, they fall squarely between promises given with no benefit or detriment or bargain (prototypical promises to give) and promises that included benefit or detriment and are bargained for. To decide whether to enforce these “middle ground” promises, then, we must ask why we don't enforce the former and we do enforce the latter. We don't enforce promises to give because they do not have relevance to parties outside the specific agreement at issue. They don't benefit anyone through economic growth because we aren't left with two parties who are better off after the deal (instead we have a zero sum end to the transaction, where one party gains X and one party loses X). They also do not aid growth by making it more likely that the money will pass to parties outside the deal. At least on average, the promisor is as likely to spend the money as the promisee, and since contracts are enforced to benefit everyone, we follow the inertia principle and let them work it out on their own. We enforce the latter promises, on the other hand, because they do benefit everyone, in that people know that if they enter contracts in the course of enterprise, they will be enforced. They give stability that allows growth that benefits everyone. The question, then, is whether it is worth it to people external to the agreement, on whose behalf courts enforce promises, to enforce material benefit promises. The answer is no. They don't provide any stability and predictability in the face of an uncertain future, as the benefit has already passed. Therefore, there is no reason to distinguish them from prototypical promises to give from the perspective of those on whose behalf we enforce contracts, other citizens. Therefore, while it is nice that the person wishes to repay the moral debt, they should not be enforced because it would cost money to enforce them and they have no effect on economic
efficiency. -On the other hand, there are intangibles here, and some see sanctity in the promise.

**Reliance on a Promise**

-Reliance, absent mutual, reciprocal inducement, does not make a promise enforceable. We need more than just detriment to the promisee (Kirksey). This is the old view.

**Estoppel**

-Ricketts says that even if no mutual, reciprocal inducement, if a promise is made and relied on by the promisee to their detriment, court may estop promisor from saying no consideration.
-However, no estoppel when no statement (Prescott)
-We see estoppel doesn't always cut it

**Promissory Estoppel**

-Note: sometimes, don't give full expectancy. Sometimes, just what is necessary to prevent injustice, not unlike restitution.
-In equity, reliance on a promise (expenditures in money or labor) can make a promise enforceable. (Seavey)
-If a person relies to his detriment, promissory estoppel can be invoked to enforce the promise (East Providence). G: no reason to circuitously invoke estoppel; just call it reliance that provides consideration! (think about this in relation to Traynor in Drennan).

**Promissory Estoppel**

- The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment
- Doesn't work with promise for permanent employment: permanent employment means at-will employment. Therefore, PE cannot be used to provide P with more relief than he would have received from full performance. (Sears)
- The Hunter court uses PE in employment context, lets P recover for 2 months off old job when induced to leave. Bad decision; they could have employed her for 1 day, since was at-will.
- Today, all courts would invoke PE in Prescott.
- Promises to give to charity will often be enforced, even when no reliance. (Salsbury)
- Equity removes bar of SOF when part performance of a K; would be fraud for vendor to insist upon absence of writing when has permitted part performance (Seavey)

Is PE possible without reliance?
- Generally, no. But sometimes with promises to give to charity. (Salsbury).

**Promises of Limited Commitment**

- Illusory promise: when promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is merely illusory. Unlimited choice = not enforceable K. (Davis, they didn't agree to anything)
- If there is no commitment of future conduct, the promises are illusory there is no K (Nat Nal)
  - Although, initial conversations established a framework that became binding when they did K
- Blackberries hypo says the same thing – we look to the inception of the agreement to see if they limited their future conduct. Note: If one party chooses to perform, this doesn't supply us with obligation, and we still don't have a K!
- Both parties must restrict their future conduct – need mutuality of obligation, and we look to the inception.
- In Obering, court says have K once B acts, but G says had K from the inception, since both had restricted future conduct (although no damages until B acts – important distinction). Bad decision, but illustrates this point
- Wood v. Lucy tells us where a K grants exclusive privilege without explicit promise to act, will find an implied promise to use reasonable efforts to bring profits into being
- Paul v. Rosen, also wrong. He's no longer free to get the lease and run a bookstore there instead of buying the business. Also could have found there was an implied obligation to try to get the lease, in line with Lady Duff. Would have given consideration. Wrong twice?
- If B agrees to buy all the asphalt he needs for the next year from seller, he has restricted his future conduct.
  - Known as a requirements contract
- However, don't need correspondence between the terms. If one party has a right to terminate at any time, doesn't matter if the other does. Just as long as both have restricted future conduct at the inception in some way.
- We see that if one party can cancel before shipment (3 months here) but then can no longer cancel, then there is consideration, because still limiting future conduct (can't wait 3 months and 1 day and then cancel) (Gurfein)

More on at-will employment
- Exception to employer's right to terminate at-will employee:
-Majority: P has COA for wrongful dismissal if P can prove termination was derived from an important violation of public policy.

Dissent: Can terminate at-will for any reason.

-Rationale for at-will is employee shouldn't be kept from moving up, can quit at any time. We could just say employer is bound but employee can quit at any time (some courts say no mutuality, but this is flawed)

-Courts are uncomfortable with at-will, however, so we see in sears if additional consideration will say employer is bound for permanent employment. This really doesn't make sense, since they were worried about binding the employee and difficulty in determining damages, but nonetheless, they do it.

-We see another exception here: when violates a clear public policy goal. (Teddy's)
  -suing in tort, and there is violation of a statute by the company involved in all of the cases cited and this one.
  -When arguing on the exam, think about the purpose of the statute

The Making of Agreements

Mutual Assent
-There must be mutual assent, often broken down into offer and acceptance.
-Concepts of offer, acceptance, and promise are still useful, but don't get too literal about it. Even if the parties don't go through formally saying these things, we can look for these things

Objective and Subjective K Theory
-Objective standard of K formation: If a reasonable person would construe words or conduct as creating a K, and the person subjectively believes it, there is an enforceable K. In Embry, since RP would have interpreted manager's words (“get your men out”) as assent to K demand, and P believed it, we have a K. (Don't want to let people carelessly misread people, makes sense in light of reliance).
  -(somewhat oddly), We do not need reliance on the promisor's promise!

-Subjective K theory: both must assent, meeting of the minds. Trial court in Embry, and 19th C. view

-Objective K theory: reasonable person standard; meeting of the minds not necessary.
  -This has largely won out.
  -“It's not what you said, it’s how you said it”

-Doesn't matter if sign a sham K, not enforceable (G and Pat w/ cabin). We also see this in Island Oil
-We see that a K can be modified after it's formation. Specifically, a party can change the terms of an at-will employment K thorough words or actions, and remaining on the job is assent to the change of terms. (Mobil Coal) (GM)
-We see that disclaimers must be conspicuous! Or won't be enforced.

-An offer confers on the other party the ability to give their assent to form a K (G selling Ferarri to Dorothy). The fact that G might subjectively change his mind isn't controlling; we don't care about what he subjectively believes!

Price requests
-We see in Moulton that if a seller sends out advertisement and it should be obvious to the person receiving that this isn't meant as an offer (maybe went to lots of people, and it's obvious), we don't have an offer. “Acceptance,” then, is actually just an offer to buy

-Conversely, if a buyer requests a price quote (this alone is not enough) and it should be obvious from their language or conduct that they wanted an offer, a response is an offer. Doesn't matter what their subjective intent was in responding (Fairmont Glass)

-When we don't know how much of each jar they're buying, this is not a K problem. They have limited their future conduct (at a minimum, breach injures them to a quantifiable degree, the cheapest jars). However, it is a remedy problem.

Agreements to Agree (Indefiniteness)
-If parties form what would be a legal K (offer, acceptance, consideration), but included an agreement to agree without giving some mechanism thorough which they are to agree, the provision is unenforceable (If, however, there was a K before, then that is still enforceable). (Joseph Martin). This is not the same as an open price arrangement, which doesn't give either party protection but gives a court a way of determining the price assented to.

Intractible Ambiguity and Indefiniteness (Mutual Misunderstanding, Latent Ambiguity)
In Raffles, we have indefiniteness due to intractible ambiguity (def: when there is never a time that the parties subjectively understood and assented to the same terms, and under the objective approach we have a basis for the ambiguity, both claims objectively equally valid)

-When does indefiniteness preclude enforcement?
  -When one person knows of both meanings and other knows of only one, courts take the side of the party that
knew of only one. The party who knew should have cleared it up. We see this in Dickey, where seller didn't say anything about the buyer's misunderstanding about how to accept. When both knew of the two meanings, we say they're both equally at fault. We can't resolve the ambiguity, so no K. This is the Restatement view. G says this is wrong because seller is the one who has to put the cotton on the ship, and buyer knows he can put it on either ship; he's assuming the risk! However, it's not enough that the terms are ambiguous; we need objectively intractible: appear to both be unequivocal but are not. (Raffles, “peerless”). Doesn't apply if parties are gambling on interpretation. When an offer is made by mail, with a stipulation that it must be accepted in a certain time period, the period begins when offeree receives offer (note: different from when the offer was made; we're talking about a term of acceptance. Acceptance is made legal when it is given to reasonable courier. Offeror is master of the offer—he exercises power to set duration for acceptance—look to offeror’s intentions. Can also set mode of acceptance. (Caldwell). Mailbox rule – if there is no specified time for acceptance then acceptance is good when it is sent. Effective even if it is never received. Acceptance is good upon arrival only when there is a specific time allotted for the acceptance.

**Control Over Contract Formation**

**Presumption of Bilateral K**
- Offeror is Master of the Offer, but....
- Law will presume offer of bilateral K when not specified. Offeree can accept with either performance or a promise of performace. Presumption that offeror is indifferent. Davis
  - One view is that bilateral K immediately and fully protects both parties. However, now offeree can't change his mind! Second reason for this, though: people are usually looking for assurance that exchange is coming. Offeror can make an offer for unilateral K, but they must specify.

**Revocation of the Offer**
- Death of an offeree revokes an offer
- Can revoke through indirect communication if offeree learns that, for example, thing has been sold to someone else (Dickenson)

After Beginning of Performance
- Old rule: Unilateral K can be revoked at any time before completion of performance.
- New rule: Unilateral K cannot be revoked once offeree has started performance. Preparations don't count; look for these ambiguities. Obligation created by part performance is called on “option K”, not unilateral K. (we see this in Brackenbury)

**Precontractual Obligation**
- Recap: Offeror has the power of regulation of the offer. Offeree's sole ability is to close the K subject to the specifications laid down by offer. The offeror retains the ability to revoke the offer until it is accepted, even without an explicit reservation of authority to do so.
- But what if the offeror includes a statement (in other words, a promise) that the offer will remain open for a stated period of time?
  - Dickenson v. Dodds (1876, English case) – Indirect communication of revocation. Note: Even if there was a promise it would remain open longer, can revoke at any time! This isn't enforceable. However, promisory estoppel would probably be available today if there was reliance on a promise to keep the offer open – this is what we see in Drennan.

**Contractor-Subcontractor Ks**
Hand View: Person making an offer isn't promising to give anything. They're offering something that only blossoms into a promise when they receive return promise they are seeking. Until this happens, have option to revoke. PE applies to gratuitous promises, but not to offers seeking a return promise! (Gimbel)

Traynor View: In these cases, there is an implied subsidiary promise to not revoke the offer. In subsidiary promise cases, a right to revoke must be expressly provided. PE is then invoked to enforce the implied promise. G says could find consideration here: Offer with implied promise not to revoke, acceptance, and detriment to the promisee (reliance on the implied promise).
- It seems one problem with this is it would force on this system too much rigidity; GCs need to be able to revoke sometimes when one plan is chosen over another. System may adjust, though; all GCs would all be subject to same rules. The converse is that Subs are in a bind; GC can revoke since hasn't accepted. So, instead, Traynor uses promisory estoppel.
-However, a GC listing a sub's offer in their bid does NOT imply a promise to accept the bid, according to SoCal Acoustics. Double standard; could find implied promise, since sub may rely on the submission including their bid but, nonetheless, this court doesn't.

-Difference between this and Drennan seems to be the issue of reliance. In Drennan, the reliance is a necessary function of the bidding process; the reliance would be less reasonable by a sub, since they should understand that a GC can revoke. They don't have to rely, and should know better; the GC has no choice but to rely.

**Preparations**

-Beginning preparations necessary to entering into performance of a unilateral K is NOT acceptance. No K formed, and offeree can still revoke.

-However, when there is reliance, courts CAN invoke PE when injustice would otherwise result. PE applies here! (Ragosta)

**Conduct Concluding a Bargain**

-General Rule: A counter-offer ends an original offer. This is to protect the offeror. G says offeror should have to bring it to an end to protect offeree, but this is not the law.

-However, if in rejecting an offer, the party manifests intent by the objective standard to renew the offer, the offer is renewed (“cannot reduce price”) (Evans).

**Mirror Acceptance (And What Constitutes a Counter-Offer)**

-We need a perfect mirror acceptance. Can't respond with different terms and create a K; it just results in a counter-offer.

-If, however, the offeree accepts the offer and inquires about a detail, this is acceptance and not a counter-offer (“I accept your offer, but at that price, is the tractor included?”). They're objectively assenting.

-Also, if they accept and reiterate a term that is part of the offer, this is also acceptance and not a counter-offer “I accept your offer, but you must convey a marketable title with no encumbrances’’ - the term is implied in an offer to sell land here, so it's a term that already exists in the K).

-New, immaterial term: If the offeree says, “I accept your offer and I will schedule the closing for my lawyer's office,’’ the K will not fail for indefiniteness; the courts will come up with a gap-filler. This is not crucial to the agreement.

**Battle of the Forms – The Exception to the Mirror Image Rule with Goods**

-When parties going back and forth with differing boilerplate forms which try to steal the other's assent; this would not work under mirror image rule. Normally, last form would win because both parties assented to it. UCC shatters mirror image rule in K for sale of goods.

In cases where the parties are going back and forth negotiating about different terms, it’s very hard to identify an offer and a counter-offer. And we don’t need to, we’re just looking for assent by both parties.

**Acceptance Through Silence**

-Conduct that imports acceptance or assent is acceptance or assent; subjective intentions do NOT matter. (Massasoit Whip)

-If a person receives and uses goods under circumstances where he had no right to suppose they were a gratuity, his assent to pay their value will be construed

-Congress and nearly all state legislatures have enacted “unsolicited goods” statutes that let people keep unsolicited merchandise.

Construe Against the Offeror – The Exception to Objective Theory!

-When an offeror creates an ambiguity about the form of acceptance (for example, says can accept with silence, so we don't know if its “I assent” or “I don't assent”), whether there is a K hinges on the offeree's intent! Offeror created the ambiguity and must suffer the consequences. Offeree must persuade us that they intended to accept, but we don't want to let offeror off the hook.

**Effects of Adopting a Writing**

Parol Evidence Rule: If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.

Restatement: An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration [...] if the agreement is not inconsistent with the integrated contract, and

is made for separate consideration, or
is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

Rationales: (1) helps us deal with liars, and (2) people have bad memories, may not remember deal correctly.

- Not a rule of evidence; a rule of contracts.
- Applies to written as well as oral Ks

- The issue is whether the prior agreement is enforceable (in equity in Lath!)
- We see in Mitchell that if a document looks, on its face, like an exclusive document detailing the entire transaction (wouldn't have this problem if they intended it to be), then parol evidence not admissible. “On its face” = sets forth in detail the obligations of each party, the entire transaction.
- When looks, on its face, like an exclusive document detailing the entire transaction, we employ 3 part test to determine if parol evidence is admissible. Outside evidence must meet three conditions:
  - Agreement must be in form a collateral one
  - Agreement must not contradict express or implied provisions of the written K. (stricter version)
    - Hatley disagrees, tells us that it just must not contradict an express provision. Does not prevent admission of things that contradict implied provisions (looser version)
  - Agreement must not contradict express or implied provisions, either
  - Agreement must be one parties would not ordinarily be expected to include in the writing
    - For example, if agree to sell a house for 100k, you would expect it to be mentioned in the writing if credit is going to be extended. Can't admit evidence of this.
    - This “naturalness” requirement only bears on the credibility of the evidence offered. If the party offering the parol evidence shows that they in fact made the agreement and that the other one wasn't integrated, it doesn't matter if it wasn't “natural” anymore.
  - Hatley tells us that to determine this we ask: whether they are experienced at business, whether they had lawyers, their relative bargaining positions, the apparent completeness of the writing itself (of course), and whether a literal reading would lead to an unreasonable result (just because one sided doesn't mean doesn't embody entire agreement, but can be evidence of whether they intended other provisions to be part of the whole)

- We presume that they made the agreement, then ask whether they intended to supersede it. Then, if the answer is no, we ask whether the agreement actually exists; this is a jury question.
- Recap: If the court decides that the writing was not a complete integration and permits the plaintiff to introduce evidence that there were other terms of the entire agreement, and the outside stuff (oral or written) is not supported by separate consideration (not a K by itself), then it can only be part of the entire agreement if (1) it is not inconsistent with the written portion and (2) was such an agreement as might naturally be made as a separate agreement by parties situated as were parties to the written contract.

- G: we see a progression of 3 possibilities in these cases
  - Parties have a writing that contains terms, but they don’t mean these to be the terms
    - For example, if they are exchanging drafts and haven’t adopted any of these as final.
  - They have agreed on some of the terms in writing, and the writing is the final expression of the terms that appear in the writing, but to does not represent the final expression of all of the terms in the transaction.
    - Meaning of Words
      - Pacific Gas tells us that words mean what the parties intended them to mean. So long as there is a reasonable basis for the meaning being proposed, courts will allow extrinsic evidence about what the words in the contract mean and consider the
circumstances of its formation
-Robert Indus. Also says we look at the K in light of the circumstances of its execution, which may uncover ambiguity that isn't apparent at first glance. Also Spaulding.
-However, Bethlehem Steel says that, when a K is clear in and of itself, extrinsic circumstances may not be considered. Plain Meaning Rule. This is the minority position today.

-Trial court in Pacific Gas also looked at Plain Meaning.
-W.R. Grace gives rationale: reduces litigation, language not ambiguous simply because parties didn't agree on meaning, party challenging literal meaning must present objective evidence that K doesn't mean what it says (not just his say-so)
-We have seen this situation in Caldwell (what does “8 days” mean?), Peerless (what does “peerless” mean?), and Embry (what does “go on and get your men out” mean?).

Standardized Forms – Whither Assent
-A person is conclusively presumed to have read a document if they signed it. This is our starting point. However, don't call this a “duty” to read.
-If a moving company presents someone a document saying it is an inventory, but it has contract terms on the back, courts will not enforce it as a contract because it was presented as an inventory.
-Also, on 512, we see that a “claim-check” is not a contract, either. It’s reasonably perceived as a claim check! (If they have actually read it, however, it is a contract).
-So, we see that depending on how docuzents are presented to the buyer, courts respond differently.
-Llewellyn: Any K with boiler-plate terms results in 2 Ks: the dickered deal, and the collateral one of supplementary boiler-plate. Many courts treat these two sets of terms differently.

Disclaimers
-Mundy tells us that if an update to a policy that alters the policy is well positioned, in good font, and uses clear language, the disclaimer is valid if it is received by the policyholder.
-Situation matters, too: In Weisz, the court says an art gallery is a place where buyers go by caveat emptor, so since the disclaimer was unequivocal and prominent, it was valid.
-Common law rule is, in the absence of fraud, one who does not read a K has no defense against its terms. However, Henningesen says that in the world of standardized, mass Ks, assent must be procured fairly. If a person of reasonable intelligence, having read a disclaimer in a K, might not understand it, then it won't be enforced. This is Obtuse Language, can result in unenforceability.
-Henningsen says that as a matter of public policy, we will not give effect to disclaimers of implied warranties. So some courts won't do this, particularly where there is a statute (but also look to constitutions, court decisions).

Exculpatory Clauses (releases from liability)
-General Rule: looked upon unfavorably because tend to allow conduct below acceptable standard of care. Aren't automatically violations of public policy, but presumption that they are.
-If unclearly labeled (doesn't take much; here said “full and final release," and court still finds this), standardized form, and all-inclusive, it is unenforceable (Richards).

Warranties in Sales of Goods
-Express: set out by manufacturer
-Implied: either courts or legislatures have said they exist. Most important: goods must be fit for their purpose. Implied can be waived.

So, courts' exceptions to “you are bound by what you sign”:
-not if document misrepresented
-not if prevented from reading it (dealer didn't call attention to it in Henningesen, more like “here sign this”)
-not if the term is buried in maze of fine print on back of K
-not if language is obtuse (confusing and difficult to read)

Generally, terms exist on the back in maze of fine print because they are changing courts' default rules.

Offer and Acceptance in the Information Age (Party can't read the K)
-Hill tells us that the, when the buyer cannot read the K (and would not listen to the recitation of a 4 page document on the phone), the offer is made when the seller ships the item with the terms of sale. They can provide, as master of the offer, that the buyer must agree to the terms, or return the item. An enforceable K is then formed once the buyer keeps the item.
-Problems with this:
-First, if no K on the phone, seller should be able to ship new price info!
-Second, need words or overt action to accept, absent course of dealing (Prescott)
-Third, we look to objective intent, not subjective. They reasonably thought they had a K, so they have a K!
-Yet, court is responding to real problem of information age and long, standardized Ks.
-3 years later, a different Federal Appeals Court says that the offer is made when the person calls the company, and acceptance is made when they agree to ship. The opposite of Hill.

**Arbitration**

-G doesn't like arbitration. Will take away your right to jury trial, and there is systematic bias.
-Problems with mandatory, pre-dispute arbitration agreements: not faster, not cheaper, little opportunity for discovery working against adhering party (since other has the info), arbitrator doesn't have to follow the law, systematic bias. Threatens the rights of consumers and employees that legislatures and courts have said they should have. Darkside to all the upside we hear about. This is Broemmer.

**Policing the Bargain**

**Revisions of Contractual Duty**

-Courts may police what formally meets the requirement for a K for lots of reasons. Examples include, abuse in bargaining, a defect in the substance of the bargain (such as illegal terms), etc. “Throwing out the garbage.”
-Should there by a separate section in the outline for ch. 4 at all?
-Limitations on the parties' ability to act as lawmakers!
-Normally, don't care as long as there is a bargain. But maybe there are situations where the motivations for making a promise should be looked at more closely

**Duress**

-Court have come up with duress, which has existed for hundreds of years as a reason to police a K.
-Started with physical duress, duress to the person. In the 18th century, courts began recognizing “duress of goods (wrongful withholding of goods until a party makes a promise; ex. man takes out a 100 dollar loan and puts up blackberry as collateral. When the man comes back with $100, the pawnbroker demands $200)
-Then we get to Austin. There is no duress of the person, there is no tortious duress of goods. The general rule in Austin is that a K made under duress is unenforceable. This case tells us that a wrongful threat that precludes the exercise of free will constitutes duress, also.
-If a P had a legal remedy but didn't pursue it, courts won't find duress, since no absence of free will (Smithwick).
-Restatement, however, says must have “reasonable alternative.” If mechanic won't give your car back unless you pay more, although you could replevy the machine, it's not reasonable. Can have the new K voided.
-Wolf says we don't look to the nature of the threat but to the mental state induced in the victim. When party acts maliciously and out of unconscionable motives, should be deemed duress (This seems like a stretch of duress).

**Pre-existing Duty Rule – Meant to prevent coercion!**

-Says that a promise to do what you are already obligated to do is not consideration (this is to prevent coercion). Ex. Can't get to the work site, when other party is now disadvantaged, and demand more than the K price for your work. You're already obligated to work, pre-existing duty won't serve as consideration for the other's new promise (to pay more).
-Problematic, though, because sometimes we want to enforce this promise. Ex. Get to the work site, killer bees, demand more money for the work. Other party promises more money, then later refuses to pay. We want to enforce this, but pre-existing duty rule say it's unenforceable (no consideration).
-This rule doesn't mean that they can't modify their agreement, but they can't modify just one term. This is a second problem: savy overreachers know to change two terms.
-So, it's not a good rule. UCC eliminates it, but otherwise is still around.

**Bona Fide Disputes**

-Duncan says where there is no dispute as to amount owed, debtor can't cancel portion of debt by paying some and saying it constitutes a settlement.
-However, where there is a bona fide dispute as to amount owed, tendering a payment with a condition that it is full payment (an offer) is a contract to settle if cashed, and they can't sue.
-So, G and E can't agree on what they agreed to as commission. E says he'll sue, G says go ahead, E says he'll settle for
$2500, they hang up. G thinks he knows it was 500. There is consideration for G's promise (E's surrendering his claim).
-If, however, G sends him the check for $2500, E will say there is no consideration because there was a pre-existing duty to pay 3000. Sue for other 500. We see a conflict between preventing coercion and overreaching and the policy in Duncan, encouraging settlement! These two conflict, see this!
-Policy encouraging settlement beats pre-existing duty rule! Ellis Loses.
-If G sends check saying “enclosed is a check for $2000 in full satisfaction for what I owe you in commission for the car.” E sends letter back saying he'll accept it as part payment, asks for more, cashes it. Did Ellis assent? Yes, actions speak louder than words, accepting by performing! Remember, he can't just change G’s terms and accept. He could counter-offer, but here he takes the money! He has accepted.
-Now, they're disputing it. They end the call without resolution, G sends check for $1500 for “full satisfaction, full payment.” E sends a letter saying he owes $3000 and cashes the check. E's argument will be that there is no consideration because there is a pre-existing duty. He's paying only the amount he owes, so this time they're not settling!
-Even when they're not settling, encouragement to settle wins out over pre-existing duty.
-Doesn't matter if they really need the money so they cash the check; out of luck.
-At common law, no executory accords. Today by statute, can promise to settle, usually must be in writing and signed by the parties.

Mistake, Misrepresentation, Warranty, and Nondisclosure

Mistake v. Risk
-If the thing delivered or received is different “in substance” from the thing bargained for, then rescission is available. Both parties must have been mistaken. (Sherwood)
-If the parties understand they are allocating the risk of unknowns, it is another matter. It's when they don't think there is any risk that rescission is available. Hinges on whether they bargained the risk into the deal or were mistaken.
-It's not enough that one of the parties is indifferent. If there is mutual mistake of fact and the buyer is indifferent but seller wants to keep the item, seller can get rescission because of mutual mistake (doesn't matter if one party didn't care about the mistake). We care about what they thought was factually true about the thing bargained for, not the extent of their stake or interest in what actually ends up being true. (Aluminum Co.)
-Where the parties know there is doubt and contract on that assumption, the K isn't void just because one party was hoping it was something more valuable to them (Beachcomber, coins).
-If one party disclaims uncertainty, they've allocated the risk.
-If someone knows seller has mistakenly marked price of an item and doesn't inform them, seller can get restitution. However, if someone knows seller has priced an item much lower than its value (but has not made a “mistake” in pricing it), and they buy the item without telling them it's valuable, seller can't get restitution (used bookstore example)
-If mistaken belief relates to a basic assumption upon which the K was made, and which materially affects the agreed performance of the parties, rescission is available (Lenawee County). Difference between mistakes running to value and mistakes touching the substance of the consideration.

Investigation
-If a buyer's investigation is reasonable and they rely on misstatements by the seller, rescission is available. Doesn't matter if you don't check the city records for zoning if seller perpetrates fraud.

Warranty
-Where a defect is known to the seller and is unknown and not reasonably discoverable to the buyer, and the defect is one that renders the land useless for its specific purpose to which it is limited by restricted covenants (residential use), in this case, an implied warranty arising out of the restrictive covenants has been breached by the seller. Seller had obligation to inform not good for its only allowable purpose (Hinson raw land “unfit for its purpose” for which it was restricted)
-They don't use mutual mistake here, because they don't want a flood of title dispute claims based on an uncertain doctrine (mistake). So, they make a very limited decision hinging on the covenant. Mutual mistake won't apply to land!
-Yepsen allows implied warranty to a house that was not well constructed so was not fit for habitation. Says people generally buy real estate for the house, not the land, so “fit for their use” warranty for goods should apply to houses. Carries over!
-With raw land, caveat emptor still reigns; the land is inspectable and anything that can be known to the seller can also be known to the buyer. No implied warranty. (Cook)

Misrepresentation
-In Cushman, we see that if a seller has superior knowledge and means of knowledge about a defect and by words or conduct leads the buyer to believe that they have made a full disclosure, and does this with the intent to deceive and
overreach and prevent an investigation (this is the rationale), it is fraud and can get compensation (this is tort).

-Duty to speak if hear another making misrepresentation (this is actually a duty)
- tells us no duty to inform of the obvious. Not fraud when painting priced very low and is an obvious print
-Duty to disclose doesn't apply to facts which buyer would be expected to discover by ordinary inspection and inquiry, like lack of off-street parking (Kincaid).
-No general duty to disclose (we don't turn every bargaining relationship into a fiduciary one)
- However, must disclose facts which buyer cannot learn with reasonable cost, or fraud.

Rules from Jones:
- Must disclose where: necessary to prevent previous assertion from being a misrepresentation or being fraudulent or material, would correct mistake of other party as to basic assumption on which they are making the K and if nondisclosure would not be in good faith, would correct a mistake of the other party as to the contents or effect of a writing, and where other person is entitled to know because of relationship of trust and confidence. Otherwise, no duty to disclose.
- Many states have statutes that regulate “deceptive” or “unfair” trade practices in consumer transactions and real estate; would need to look at law in jurisdiction.

Recap
- If S and B believe the stone is a diamond, and it turns out it's a topaz, B can rescind. (Sherwood)
- If it turns out to be a diamond but it's limited in the way it can be cut, and is worth 1/10 the price, probably goes to the substance. After all, was still a cow in Sherwood, but a defective one. Same thing here.
- Both think it's a topaz, turns out to be a diamond and worth 10x as much. S can get rescission.
- S thinks its a topaz, B thinks its a diamond, so pays topaz price. Turns out it's a topaz. S can't rescind, no mutual mistake.
- S representing it as a topaz, which is was. B made the mistake and took the risk.

- Should B be able to snatch up S's mistake and take advantage when only S makes a mistake?
  - Hill says even unilateral mistake may justify rescission where a misrepresentation is fraudulent or where a negligent misrepresentation is one of material fact.
  - Restatement says he can rescind under certain circumstances, not under other (above).
  - However, this is not mutual mistake, so sayign it's not mutual does not end the discussion.
- If B has non-public info that a mall is going to be built across from S's house that will 10x the value, and when they get to the closing S wants out of the deal, he cannot get it.
- Could make argument that where one party is unaware of the risk, should not be able to use non-public information.
  However, where does this stop? Does mall builder have to disclose that he is planning a mall that will 10x the property values? Nothing would get built.
- If S says, “with a mall going up, this will be worth a lot,” but knows that mall deal has fallen through. This is like Kirby, it is a half-truth. This is fraud.
- If sub enters bid of 7k but meant to bid 70k, and GC sues for the difference between 7k and 59k, his replacement, GC probably won't win (because it probably wasn't reasonable). Take home point: If party should know other made a mistake, cannot snatch it up and take advantage of that mistake.

**Changed Circumstances Justifying Nonperformance**
- In the mid 1600s, contracts were read literally and excuses based on changed circumstances had to be written into the K.
- At some point, courts began to recognize that parties cannot be expected to anticipate every contingency that might arise in the performance of their contract.
- We're talking about risk. Common to both objective impossibility and impracticability is some assumption that is fundamental to the exchange that proves to be untrue. In one, assumption of existing fact. In another, assumption as to state of world in the future.

**Objective Impossibility**

Destruction of the Thing
- G: What we're talking about here is risk
- Where performance of a K depends on the continued existence of a given person or thing, a condition is implied that impossibility of performance from the perishing of the person or thing will excuse the performance (meaning, other party can't recover damages for failure to perform) (Taylor). Rationale: intent; the parties contracted on the basis of the continued existence.
- If the parties had contracted allocating the risk of a foreseen disaster, this would be different. Since they didn't contemplate it, not bargained into the price of the agreement. Therefore, the source of the implied condition is the parties' intent, not actual, but presumed.
- Can other party counter-claim for other's performance?
-Rugg says yes, still have to pay (independent promises idea)
-Taylor says no (in dictum), both parties excused. Later courts have followed this view (dependent view of promises)
-What if party still wants to use the thing in it's non-existent state (ex. Burned down) and pay full price.
-They should be able to, but the law says that they cannot.
-Where a property is considered leased, lessee will not be excused. Where they do not have exclusive possession even against the owner (ex. Renting), then will be excused.
-If the condition preventing performance of the K is foreseeable and could be guarded against, performance will not be excused.
-If it's not legal, it's considered objectively impossible
-So in Kel Kim, what if city passes ordinance saying no skating rink withing 5000 yards of school and the rink is within that range. Not impossible, could conduct any business on the premises
-If in uranium hypo, Canadian gov't requires a license, and M can't get one. Not impossible, since could have been foreseen and guarded against

Personal Promises
-Ks which can only be performed personally by the promisor terminate when death renders the personal performance impossible. Here, court says it was rendered to the priest personally, so church was excused from paying! (there's lots of ambiguity as to who it is rendered to – issues). It seems like courts will stretch this, so should on the exam (here, they're saying only priest was expert enough to appreciate the organ player's work – in actuality, the player was the expert!) (Harrison)
-G says very unusual case

Impracticability
-We see in Park Land Co. that where performance depends on the existence of a given thing, it may be excused if is is impossible in the sense that it is not practicable because it can only be done at an excessive and unreasonable cost.
-Hypo: M contracts with F, freighter, to ship sunscreen from NY to Hawaii. Panama Canal closed, F says would be impracticable. What result? These cases are very iffy! How much more would it cost? Also, assuming it's unforeseeable, we're asking who should bear the risk.
-Park Land says increase by 10x is enough
-Westinghouse, price of uranium quadruples, would lose more than $2 billion. Court says not impracticable! It takes a LOT
-Maple Farms (milk) says an increase of 20% is not enough (why did G say 400-500%). We see that courts are certainly reluctant to say it's impracticable, because we're talking about allocation of risk. When K fixes a price, as opposed to an open price, the parties are allocating the risk of future events that might affect the desirability of that transaction. This is why courts are hesitant here and in mutual mistake, as we saw. Always look at the risk.

Frustration of Purpose
-Performance is excused if some supervening event frustrates the purpose of the K (if thing or event that was basis for formation of K ceases to exist or take place).
-L is company in Kansas, contracts to pick up 1000 pounds of uranium from N in Canada. US passes law saying can't bring uranium into US. See how this fits together: it's not impossible (he can go pay for it and pick it up), but the purpose is frustrated. But M might not know that he intended to take it to Kansas, and even if he is aware, it's not part of his purpose! So even here, relief not available, since it only frustrates the purpose of one party.
-Krell cab hypo: person who hires cab isn't excused if race is cancelled because parties must have same purpose!

For the remedies question in these cases, see Comment: Relief Following Discharge

Unconscionable Inequality

Won't be Enforced in Equity
-We saw in chapter 1 that even if the remedy is not adequate, the P isn't entitled to equitable relief. It's up to the discretion of the court (won't do it in personal services, if it would drag on and would not be the end of the matter, etc.). This is another reason won't give relief in equity – unconscionability! Won't be enforced in equity (Woolums)
-Notice, this is inconsistent with not looking into adequacy of consideration
-In Kleinberg, we see SP won't be granted when one party makes an honest mistake and the the other party knew about the misunderstanding.
-Also no SP if bargain “shocks the conscience (Delancy, drunk guy makes bad land deal)
Won't be Enforced at Law
-In Walker-Thomas, we see that an unconscionable K is also unenforceable at law

What is unconscionability?
-According to Walker-Thomas: absence of reasonable choice (even if she could have gone without it, might still be absence of reasonable choice because she was tricked or language was obtuse), unreasonably favorable terms, gross inequality in bargaining power, and the way the contract is formed (maze of fine print? No opportunity to understand terms? Etc.). So we have:
  -Absence of reasonable choice = procedural
  -How it was formed = substantive
-So here, it unreasonably favors the seller because, substantively, the provision offends
-UCC: consider commercial setting, purpose, and effect
  -G: Inherent contradiction. If every merchant using same terms, there is absence of meaningful choice. But if everybody is using it, then it's consistent with commercial practices! Therefore, terms not unreasonably favorable.
-Raises interesting Qs: on the one hand, they need these provisions to offer these people their goods. On the other, they're saying they have to choose between paying the loan and for utilities, school supplies, etc (since it's cross-collateral). So, probably is unreasonably favorable, even though it may seem reasonable at first. G: “interesting and troublesome case” for consumer transactions
  -Frostifresh court lets P recover cost plus reasonable profit, pluse other expenses. No incentive to not engage in unconscionable conduct.
  -Need to send message, like in Richards, with noncompete pledges, etc. Don't want tip-toeing; if you overreach, we should take it all away
  -Gianni tells us this can apply in a commercial setting. However, this is much harder.

-Note tells us that Ks also policed by legislatures, not just courts. Maryland cross-collateral law, as an example

Remedies for unconscionability:
  -rescission is an option
  -strike the clause
  -modify the provisions (frostifresh, least defensible option)
  -Take home point: UCC gives LOTS of power to the courts to handle all issues of unconscionability, including the remedy (but also its definition). Novel, evolving standard

The Maturing and Breach of Contract Duties

Effects of Express Conditions
-What we're talking about is what happens when something the parties said would happen does not happen. Including performance (Ch. 1)
-Condition: some operative fact after exchange of promises and before performance on which the rights and duties of the parties depends. If the fact exists (the event occurs), they're obligated to proceed. If it does not exist, duty to perform does not mature.
-If in Mitchell, the parties had included the ice house in the contract, would have been a condition.

Forfeiture
-If there would be a forfeiture, we construe in favor of promise to prevent forfeiture. (Howard)
  -If they aren't clear it's a condition, it's not if would result in forfeiture.
  -If promise, other party can get damages but their obligation matures.
  -We also see “construe against the drafter” (adhesion Ks). Double-whammy here
-Also with house/loan example 8% rate – construe in favor of promise, not condition. We look to intent of the parties; they didn't plan that the money would not be paid back. If they agree to a 40% interest rate, now argument that risk has been allocated. If house doesn't sell, lender's out of luck.
-Restatement: unless it was a material part of the agreed exchange
  -we see sometimes even if the condition has not occurred (with no misstatements unlike Gilbert), court will make other party perform their obligation. Sometimes even if not met, other has to perform, courts will say. Courts are divided on this in the insurance context (Aetna, hold ins. co. still has to perform). Again, forfeiture is at issue; this is what we're balancing.
Impossibility
-In Semmes (civil war – 12 month limitations on suit for damages), we see that if express condition becomes impossible, it disappears. Can still bring suit.

Result of Failure to Fulfill an Express Condition
-excuses performance and entitles other party to restitution of part payment; but not a breach making non-fulfilling party liable for damages.

Estoppel and Waiver
-If a K gives a time frame in which suit must be commenced, and P relies on mistakes by D and misses time frame, D estopped from claiming didn't bring suit in time. Time frame starts after P stops relying. Isn't a waiver.
-Some courts hold that conduct giving rise to estoppel can sometimes manifest intent to waive right. However, good argument against this: no consideration, would be holding D to misleading statements just because they made them, like holding one to a promise they don't fulfill (Thomason), some courts say this is exception to notion that promises aren't binding without consideration (Note Material)
-Waiver is an intentional relinquishment of known right; estoppel is preclusion to assert a position. Reliance is essential to estoppel; less clear what's necessary for waiver.
-Just because a party negotiates after the expiration of a time frame for a suit, this doesn't indicate intent to waive the requirement (Gilbert Frank)

Timeliness as an Express Conditions
-Parties can contract to make timely performance a material element of agreement. “Time-is-of-the-essence clause.” Whether time is of the essence is question of parties' intent, determined as a matter of fact from language and circumstances. (Note Material). Courts will find performance to be mandatory if this is the case. General rule: not of the essence with real property (courts of equity particularly lenient; although, one case wasn't this forgiving, atypical) (Doctorman, Note Material).

Conditions of Satisfaction
Of Architect
-If express condition architect must approve of builder's work, it can't be withheld in bad faith (Second Nat'l.)
-If express condition architect must approve of builder's work, and it's withheld unreasonably and unfairly (maybe architect is in the 40% with uses 8 rivets), but not in bad faith, builder is NOT excused. We see the encouragement of settlement; the parties agreed to this arrangement and have to work it out so long as architect in good faith. Probably no restitution; court would have to ignore K; might depend on how much paid to that pt.
-Good faith = can't refuse for something not in the K (ex. Issue of timeliness), can't act at the dictation of one of the parties (Maurer, Fay).
-The architect must specify what needs fixing to secure approval, or condition is waived.

Of Party to the K
If the K pertains to taste or fancy, can be refused arbitrarily. No implied promise to be reasonable; can't be in bad faith. Benefit of doubt to obligor
-Contract for valet and laundry for hotel owner qualifies, bargained for relationship with his guests that would enhance their good will; inherently subjective and about fancy (Hotel Abbey)
If K pertains to fitness, utility, or marketability, we use an objective standard. Must be reasonable
-Construction Ks, can't arbitrarily refuse to acknowledge satisfaction (Haymore)
-Attorney services (Breslow)
Restatement tells us to us objective standard where it's practicable, where we can determine if reasonable person in position of obligor would be satisfied. If we can't, benefit of doubt goes to obligor. Basically as above.

Constructive Conditions – The Order of Performance
S contracts to sell her collection of cardinals bobblehead dolls for 5k on dec. 5. B promises to pay 5k. Both sit in their living rooms waiting for the other to show up? The cases in this section are variations on this hypo.
-Unlike the first section, here there is no express condition. Here, is it conditional even though the parties haven't said that it should be.
-In Nichols (1615), we see P can recover even though P has not said he delivered the cow. Read literally at common law,
In Kingston (1773), we see the **dual nature of the promise**: court says a promise is always an obligation of the promisor, and sometimes it is *also* a condition of D's obligation to perform. (In Fed. Crop, we see it can be either – sometimes its both). Must look to intent of parties to see if there was a constructive condition (better than saying implied condition, matter of law)

-Restatement tells us that when they can be performed simultaneously, they are due simultaneously unless language or circumstances say otherwise

-General rule from Price (1941): Construe as dependent unless the good reason to view as independent (nature of the K or circumstances). Where party agrees to loan money knowing security might not be ready, this is good reason to view as independent. In line with Kingston: intent of the parties. Presumption different

Note the progression:

- Nichols: Promises independent
- Kingston 100 years later: has an open mind
- Price 170 years later: presumption that they are conditional (exact opposite of Nichols)

Rule: Must render *or* tender; don't have to render. Shouldn't have to deliver if other will breach. As we saw in Restatement, when parties can, must perform simultaneously.

Exceptions to render or tender – P doesn't have to render or tender:

- When D *can't* perform.
  - If the thing is under D's control, they can perform as matter of law; can perform if not impossible (Ziehen). However, if all we have is a breaching P, courts won't allow this. (Ziehen, where D didn't know and *couldn't* have cleared up encumbrance, and P didn't perform). In Ziehan, probably a good place for P to recover down payment in restitution, but that's it!
  - When D has repudiated

-Seller doesn't need title during entire executory period – this is a defect that can be removed, so does not meet the test. Economically efficient (Neves)

-If they are to perform at the same time (which is usually the case) and *neither* party tenders, the obligations continue sometime after the time for performance; party who wants to use legal process has to put the other in default

- G: distinction between law and equity: At law, court's judgment is firm and unconditional. At equity, courts can make a judgment that is condition on some subsequent action by P. Can protect the exchange and make sure D doesn't have to do something when P isn't performing. In equity, courts relax the requirement of tender, not always however, as we see in Ziehen (clarify this – was this case in equity??)

Rule: Rescission is an equitable remedy. Where vendee asks for all relief, “just and equitable,” courts will often give rescission, returning parties to precontractual positions.

**Protecting the Exchange on Breach**

- The Q: Is nonperformance serious enough to justify the other's response to it?

**Time of the Essence in Sale of Goods**

- In K for sale of goods, courts have said time is of the essence! Rationale: goods moving quickly (Oshinsky). Other party does not have to accept the goods, seller can't recover damages. Can buyer?

- Where it's not a sales K (or it is hybrid, ex. Letterheads not sellable to anyone else with labor), there is a presumption that time is NOT of the essence. Buyer's remedy is in damages for the delay.

**Perfect Tender**

- In K for sale of goods, performance must conform in every respect or it wouldn't be fair to enforce other's promises. Perfect tender rule. If seller bring 299 of 300 bikes, buyer can reject. If one of 300 is defective, buyer can reject. PTR continues today for sale of goods, at least on its face.

- No excuse for imperfect tender (Prescott, war rations case). Seller cannot recover damages for refusal to accept.

- Problem: PTR allows opportunistic buyer reason to escape

**Substantial Performance Doctrine – An exception to Perfect Tender**

- We know that at the end of the line, builder's completion of the project is a condition of the owner's obligation to make the last payment. Under Kingston, Ziehen, and Oshinsky, builder couldn't recover: no perfect tender. However, when the builder has substantially performed, the owner's obligation becomes due. Rationale: owner has practically complete house, can't keep it without paying. Not restitution, but is same idea. Balances hardship of builder against hardship of owner.
This is recovery on the K

-Dual nature again: Here, obligation is discharged only by full performance, but condition occurs if builder has substantially performed. So we take the contract price and make an adjustment.

-Remedy for buyer: Cost of repair, except where it would be economically wasteful (often); then, diminution in value. Restatement tells us to use cost of completion (Monumental Fountain! Apparently, court thinks like Groves dissent, Peevyhouse: won't use the money to move the wall, so diminution.

-What is Substantial performance?

-Unless all details are made the essence of the contract, something less than perfection. Substantially performed unless there are features or details of construction of special or great personal importance that are not performed. (Plante)

-Defect in construction discovered later: diminution in value standard if the defect is trivial. Normally nothing. (Diff where every term is of the essence) (Jacob & Youngs, wrong brand pipe)

-Build can recover in restitution for benefit conferred on D when they have NOT substantially performed (Armstead). How would this be calculated?

-Also applies to employment contracts: If employee has substantially performed his K, can sue on the K for contract price (Hadden, pension case)

Material Breach – the Other Side of the Coin

Examining the rights of the party who has received some but not complete performance. May be able to walk away from the relationship, but the question is when

Is the shortfall in performance a material breach?

- A breach by one party that causes little damage to the other will not justify the other in ending the relationship. Rationale: want to keep the parties together.

- To decide when, we use material breach: if material breach, cancellation permitted and party can sue for lost expectancy on the entire K; if no material breach, cancellation not permitted.

- This is not rescission. We're talking about ending the relationship and being placed in expectancy position.

- In Turner, the failure to pay 4 times does NOT justify ending the K. The court says you must wait a “reasonable” time. It seems courts tend to be lenient

-What is material breach?

Does the breach defeat the essential purposes of the contract? Another court says (different way of articulating this) defeat the essential purposes of the parties. To determine this, we look at (1) Cause of the fault (can't be just a change of mind, taking advantage of changing market conditions), (2) extent of the fault (if it's about time, how much time has passed since due), (3) the needs and expectations of the parties (another way of asking, “is it a big deal?” and (4) likelihood that the fault will continue (as opposed to the party bringing its performance in conformance with the K).

- Somtimes, courts won't give expectancy. The court in Aiello says we look at the circumstances; sometimes, expectancy would not be just.

- If it only goes to part of the consideration (ex. Sale of multiple goods), sometimes courts say no material breach. Just remedy in damages (Tichnor Bros.)

Problem with our system of constructive conditions: burden on non-breaching party to remain ready, since court will often find no material breach.

Anticipatory repudiation = material breach if: (1) it's a bilateral K, and (2) P has not completed performance. Because R = free up P to do something else. In Webb, he did not sue for lifetime payments, he sued for payments from repudiation to date of lawsuit. THIS IS WHY.

- We see this in Hochster and Reliance Cooperage Cases. Also, in Rockingham, they are allowed to recover their loss on the entire contract. This all makes sense now, repudiation = material breach.

- Where it's a unilateral K, like in Greguhn, the court says he can either wait until he's dead or bring a suit every 2 years. He cannot get expectancy, because it doesn't meet these conditions. Dissent disagrees, and G agrees with them. Wouldn't help him, he should get expectancy.

We first need to know if there has been a repudiation:

- Ask, do the words or conduct amount to a repudiation?

  - Paul v. Rosen, where wouldn't conduct inventory. Not saying he won't sell, but tantamount to saying it. This is repudiation.

  - If the person insists on something new, will only perform on different terms. This is repudiation.
-So, in Greguhn, majority saying there was no repudiation (thought it wasn't covered under K).  -Dissent says, even if they didn't intend it, they have repudiated!  In other context, it doesn't matter if they dispute what they're obligated to do (think about Algernon Blair, where D was in good faith – court says was in good faith, but was wrong).

-G: Also, notice that this is just an application of constructive conditions.  Think about how this all related to Ch. 1.  What goes around comes around.

-Corporali middle ground: monthly installments, with interest, payable as they become due.  Some courts say you can't do this (Note Material).

More on Anticipatory Breach of Unilateral Conditions:
-Options in Greguhn were:
  -restitution (worst option)
  -declaratory judgment
  -judgments payable in installments (some say can't do this) (Corporali)
  -relief in equity (some courts have said specific enforcement of payments a possibility) (Fed. Appeals Ct. from note material)

-unilateral K exception to anticipatory breach remains in place in most states.  Courts often try to avoid it by finding some dependency of obligation at time of repudiation.

-In Reigart, we see that substantial performance works same in equity as in law.  P can recover if the defect doesn't go to the essence.  (land 5 acres instead of 7).

-However, in Keating we see physical size doesn't matter.  (¼ of acre with road and water).  Intention of parties and not physical size controls.

-And reformation available after K has been executed if both mistake.  (buyer has to pay for extra land years later).  We see mutual mistake doesn't apply to land contracts.

Final Notes
-Think about Aetna in light of Plante.  Court says circumstances where a person must perform even though an express condition has not occurred.  Rules of constructive conditions may be slipping over to express conditions!

Remedies: If P has substantially performed, has action on the K.  But probably CANNOT sue in restitution, because considered complete performance of the K.  If does not amount to substantial performance, remedy in K not available, but restitution typically is available.

Is substantial performance done in equity?

Miscellaneous

If you think deciding case is wrong, point that out!

SOF:
- Equity removes the bar of SOF when there has been part performance.
- Goods over 500 dollars
- K that can't be performed in 1 year
- Land K