CONTRACTS OUTLINE – NELSON - 2008

**Bargain**
- Hallmarks
  - Volition
  - Capacity
  - Mutuality
  - Meeting of the mind (consensus ad idem)
  - Offer+Acceptance+Consideration
- Express vs. Implied in Fact
- Bilateral vs. Unilateral
- Coolidge (agency)
- Kirksey (reliance)

**OFFER**

_Synthesis:_ Per R§24, an offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited, and will conclude it. There are several hallmarks of what constitutes an offer, which will help distinguish an offer from mere negotiations, preliminary proposals, invitations to make an offer, or “morale boosters.” (Per _Murray on Contracts_). The first and strongest way to determine if there is an offer is to consider what a reasonable person in the position of the recipient of an offeror’s manifestation would be led to believe (objective test). The words and actions surrounding the manifestation matter; a person’s “secret intentions” cannot preclude an offer from being made if a reasonable person would their actions to constitute an offer (Embury, Southworth). Second, the actual language of the manifestation is important; if there are no actual words of promise or commitment, it is less likely that the manifestation constitutes an offer (Local 1330, Maytag). Third, the number of people to whom the manifestation was addressed is significant; the greater or more indefinite the group of recipients, the more likely the manifestation is to be an invitation to make an offer or an advertisement rather than an offer (Leonard v Pepsi, Southworth). Fourth, level of definiteness of terms used in the manifestation can influence whether there is a real offer – the more definite the terms, the more likely an offer can be found, and vice versa (Leonard v Pepsi, R§25). Fifth, trade practices may influence whether or not an offer existed where one might not normally find one (Drennan v. Star Paving). Other considerations may also determine whether or not there is a contract. Agency is significant; the offeror must be qualified to make the offer in the first place (Coolidge, Local 1330). Further, offers might be implied in fact rather than expressly manifested (Steffes v Brooks)

**Questions**
- Was there a contract at all? (Was there at least offer + acceptance)
- Who was the offeror, and who was the offeree?
  - **Offeror:** is master of offer
  - **Offeree:** has the power of acceptance
  - **Counteroffer:** switches the parties; offeree becomes offeror
- _Embury:_
  - A party’s “secret intentions” cannot prevent a contract from occurring if the words/deeds/actions implied that a K did take place.
A party’s words/actions put to the “reasonable person” test, must be objectively determined; what would a reasonable person deduce from what took place?

**primary object of construction in K law is to discover the intention of the parties.** This intention in express contracts is embodied in the words which the parties have used and is to be deduced from them. This rule applies to oral contracts, as well as to contracts in writing, and is the rule recognized by courts of equity.

- **Notes on Embry:**
  - Enforced a bilateral contract implied in fact (could it be unilateral?)
  - Courts found a contract despite no meeting of the minds; based on actions rather than inner intentions
  - Uses positioned objective person test (position of recipient of communication)

- **Local 1330 v. US Steel:**
  - “Morale boosting messages” cannot be construed as promises, especially when given by someone who is not an agent of the party in question
  - Non-binding statements from non-agents cannot be reasonably relied upon
  - The context of communication between parties is significant in determining whether they meant to contract
    - **Notes on Local 1330:**
      - No K
      - IIs were alleging an express unilateral contract (they accepted Kirwin’s messages by continuing to work at the factor and making it profitable)
      - Court used a socially situated objective person test (put in position and social identity of recipient of communication), found that workers should have expected plant’s closing based on national trends

- **Maytag:** When material promises are made by a proper agent or party, they can be reasonably relied upon
  - **Notes of Maytag**
    - Court enforced express unilateral (?) based on what they found to be binding promises made by the company

- **Steffes v. Brooks:**
  - well-grounded principle in human experience: where one renders valuable services for another, payment is expected
  - A party who renders services as a member of a household **can expect payment even in the absence of an express contract, if there is a contract implied in fact**
Close family, marital, or sexual relationships do not automatically indicate that services rendered are gratuitous, even in absence of express contract.

Compensation between parties can only be granted if services were rendered at the specific instance and request of one party; party who is treated as a member of a household may perform services that are not necessarily “expected,” and therefore could be at specific request of Δ.

**Notes on Steffes v. Brooks**
- Court found a K implied in fact based on evidence that the deceased intended to compensate Π, despite lack of express offer.
- Π’s status was difficult to determine, not hired as an employee, but not a member of the family (meretricious relationship with deceased).

**Normile/Wawie v. Miller (+ acceptance)**
- An offer can be revoked at any time before there is an acceptance, as acceptance is the moment at which a contract is formed (except with options contracts).
  - Must give notice of revocation, and must come from a reasonable source. Sometimes entering into a new contract is enough “notice” of revocation of a different offer.
- If the offeree is purporting to accept an offer, but materially changes the offeror’s terms, offeree is inherently rejecting the first offer, meaning that original offer can no longer be accepted (mirror image rule).
  - When terms are changed or new ones added by acceptance, no meeting of the minds, no contract – G. Thompson §4452
  - Counteroffers amount to a rejection of the original offer – S. Williston §51.
- A valid contract can only occur when two parties assent to the same thing, requires offer and acceptance in exact terms.
- R§39 (counteroffers):
  - (a) counteroffer is an offer made by offeree to offeror relating to same matter as original offer, proposing a substituted bargain.
  - (b) offeree’s power of acceptance is terminated by his making of a counteroffer.

**Notes on Normile:**
- No K
- Π trying to enforce an express bilateral contract to purchase a house, but lost power to accept by making a counteroffer; Δ exercised power to revoke offer at any time prior to acceptance by making new K with third party.

**Southworth v. Oliver (+ acceptance)**
“What constitutes an offer” case (remember Murray on Contracts guidelines)

Whether, under all the circumstance existing at the time that this “offer” is received, a reasonable person in the position of the offeree would have understood the communication to be an offer by the offeror – if yes, then there is a binding offer than can be accepted and subsequently enforced

Murray on Contracts: how to determine if an offer exists

- What would a reasonable person in position of the offeree believe, given circumstances/capacity (objective test)
- What language is used – are there words of promise or commitment? Is this an offer or just inviting an offer, or preliminary negotiations?
- To whom was the communication addressed (the more people it was addressed to, more indefinite of a group, the less likely it can be a binding offer upon acceptance)
- How definite is the proposal? More definiteness = more likely to be enforced
- What are relevant community practices, courses of dealing/negotiation?

- **Notes on Southworth:**
  - Express unilateral contract, dispute regarding whether a communication was an offer was made to sell land or whether it was simply the beginning of negotiations. Court enforced K.

**Leonard v. Pepsi**

- Advertisements are mere requests to negotiate unless there are exceptional circumstances and there is clear, plain language that promises some commitment
- R§26: A manifestation of willingness to enter into a bargain is not an offer (Harrier jet for Pepsi points) if the person to whom this manifestation is addressed (Leonard) knows or has reason to know that the person making it (Pepsi) does not intent to conclude a bargain until he has made further manifestation of assent
- With order form cases, if the company is considered the offeree, then even a completed order form (offer) does not constitute a K if not accepted by the company
  - Carbolic Smoke Ball case – explicit promise is offered upon use of product, explicit reward promised if product does not perform, induced a specific behavior unlike an offer to negotiate (unilateral K cases)
  - Lefkowitz: sufficient definiteness to the offer to make it binding (certain # of coats for a specific price at a specific time); limited number of acceptances possible
- Mere puffery: if it is clear the offer is a joke, not serious, then no offer has been made
- **Notes on Leonard**
  - Courts found no enforceable K
  - Leonard trying to enforce an express unilateral contract
  - Relates to R§26 (negotiations), Murray on Contracts guidelines to whether there is an offer

- **Doctrine of misunderstanding**
  - *Konic v. Spokane*:
    - When parties each misunderstand and/or attached a materially different meaning to a key term in the contract, that contract is void per §R. 20(1)(a); this means that there could not possibly be a meeting of the minds, any agreement reached between them was an illusion.
    - Each party must be reasonable in their misunderstanding of terms
  - *Acedo v. AZ*
    - You take responsibility for what you sign, especially with express standard form contracts
    - A contract will be enforced when one party (adoption agency) has attached specific meaning to a material term (terms of adoption agreement), and other party (Acedo) has reason to know of that meaning per R. §20(2)(b)
    - Adoption contracts are frequently strictly enforced (forced to perform)
  - **Notes on Acedo**
    - Courts enforced K, found express bilateral, standard form contract
    - Acedo had capacity to understand and said she understood the terms, adoption agency had no way of knowing that she did not actually understand (clean hands)
    - Therefore, her subjective reasoning is unreasonable
    - Public policy driven decision; returning to status quo would injure innocent third party (adoptive parents)

- **Izadi**:
  - The test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.
  - A binding offer may be implied from the very fact that deliberately misleading advertising intentionally leads the reader to the conclusion that one exists.
  - R(20)(a), comment (d): one party knows the other’s meaning, and agrees to this meaning despite intending to insist upon a different meaning, may be guilty of misrepresentation
• Notes on Izadi:
  □ This is a binding OFFER that resulted in a valid unilateral contract. Offer was binding, despite being an advertisement, under R(2)(a); court finds this to be a bait and switch case
  □ Void for public policy: “too much disregard of law and truth in the business/social/ political world of today, time to hold men to their primary engagements to tell the truth”

• Restatement §20:
  o (1): No K when both parties attach materially different meanings to manifestations of mutual assent and
    ▪ (a): neither party knows/has reason to know meaning attached by the other
    ▪ (b) each party knows AND has reason to know meaning attached by the other (???)
  o (2): there is a K in accordance with meaning attached to manifestations by one of the parties if
    ▪ (a) that party does not know of different meaning, and other party knows of first party’s meaning
    ▪ (b) that party has no reason to know of any different meaning, and other has reason to know of first party’s meaning

ACCEPTANCE
Assent v. reliance: contractual obligation should not be imposed on a person who did not in fact agree to be bound. HOWEVER, if too strictly enforced, policy of protecting reliance may be undermined.

Mirror image rule: terms in the offeror’s offer and terms that offeree accepts must mirror each other; if offeree’s acceptance has changed the terms, this may reflect a counteroffer and not an acceptance
  • grumbling acceptance: the exception to this rule, when offeree has added terms that are already implied or accounted for in original offer, (PANHANDLE)

Mode of acceptance: offeror has power of determining the mode of acceptance, the more unreasonable it is the more clearly it must be expressed (PANHANDLE, should have said they didn’t want Nowlin to write on the document) (BEARD, when mode of acceptance is clear, oral acceptance do not trump)

Reasonable person test: assent is measured in light of what a reasonable person in the position of the recipient of the manifestation would have thought.
  • Formal
  • Positioned
  • Socially situated

When is there NO OFFER?
• Rejection
• Revocation
• Retraction (BEARD)
• Lapse
• Death of offeror
WAS THERE ACCEPTANCE?

**Panhandle v. Nowlin Smith**: company offers to rehire employee given certain conditions; employee agrees, adding notations below which he signs his name again. Employer argues this is a counteroffer and since it did not accept, not an agreement.
- Nowlin asked for things he was entitled to as an employee, terms not changed
- Panhandle did not specify mode of acceptance to say that Nowlin could not make notations on the document
- Alleged oral communications that defined mode of acceptance not accepted by court, should have been made clear in the document that Nowlin signed.

**Beard Implement v. Krusa**: Krusa (offeror) changed mind about buying combine from Beard (offeree), since purchase order had not been signed court found in favor of Krusa
- Purchase orders merely OFFERS TO BUY, must be signed to have acceptance
- **UCC §2-206**: If A’s offer is contained on a purchase order, and is unambiguously inviting acceptance only by signature of Π (dealer of goods), no contract exists until the order is signed accordingly
- Offeror is the master of the offer, Beard should have signed the purchase order if they wanted to accept Krusa’s offer to buy the combine

**Russell v. Texas Co**: Russell made offer to Texaco that their continued use of his land (and the retention of benefits from such use) would constitute an acceptance of his revocable license, for which he expected payment. Texaco did not respond, but rejected the offer a month later.
- Silence is generally not acceptance, BUT, offeree may not reject an offer after s/he has retained the benefits of that offer.
- Acceptance of benefits offered in offer = acceptance of offer, even if acceptance is never explicitly expressed
- Offer must be clear and unambiguous (“if you retain the benefits of this offer, you have impliedly accepted).
- Thus offeror was reasonably led to believe that offeree had accepted
- Specific to this case: tortious overlay of Texaco’s behavior made it easier for the court to find them in breach (were tortious prior to Russell’s offer)

**Harms v. Northland/Moccasin Creek**: Harms thought she accepted the hole-in-one “offer” (contest) by performance of a hole in one; Δs said that because she didn’t tee off the men’s tee she did not perform via the correct mode of acceptance
- Δ must abide by the mode of acceptance/rules it announced, not by one that it didn’t announce (**PANHANDLE**)
- Offer is viewed through the “plain meaning standard,” which is simply that a hole-in-one constitutes acceptance. Since none of the people to whom the offer was made were confused, Harms not unilaterally confused
  - If she WERE, this would be valid defense to get Δ out of contract
- Waiver issue: Harms could not waive her right to the prize because it was not hers to refuse (amateur golfers cannot be compensated)

WAS THERE REVOCATION (OPTIONS Ks, §87)

Options Contracts
Defined: when the offeree provides separate consideration in exchange for offeror’s promise not to revoke (contract within a contract, contract to keep the other contract open as an option for the offeree)

**OPTION CONTRACT (FOUR TYPES)**

- (1) offer is binding as an options K when
  - a) in writing and signed by offeror, gives consideration for the making of an offer, and proposes an exchange on fair terms within a reasonable time. *(Dickinson v. Dodds*, this did not happen so no K)*
  - b) made irrevocable by statute
- (2) where a merchant offers to sell or rent foods and written offer expressly provides that the offer will be kept open *(UCC §2-205)*
- (3) where offer requires acceptance by full performance, and offeree has begun performance (offeror cannot revoke)
- (4) offer which offeror should reasonably expect to induce action or forbearance of a substantial character on part of offeree before acceptance and which does induce such action is binding. *(Drennan v. Star Paving)* *(did not occur in Wheeler)*

**Dickinson v. Dodds:** Dodds’ offer to keep property open until Friday, despite saying “I agree to sell,” was still only an offer. His revocation of the offer (by offering the same property to someone else) was valid even though it was never actually expressed to Dickinson.

- To recover, Dickinson needed to provide additional consideration to keep the offer open until Friday (I accept by giving you $20 to keep the offer open); otherwise it would have been acceptance without consideration.
- **TAKEAWAY:** good for getting out of K via unexpressed revocation, options contracts

**Unless both parties are bound, neither is bound**

**Washington v. Wheeler:** Wheeler is suing to enforce a plea bargain that he alleges ∆ agreed to and then backed out (“revocation” was prior to the entrance of guilty plea)

- There was no detrimental reliance upon the plea agreement *(per §87(2))*; Wheeler’s psychological reliance was not enough to enforce agreement
- Plea agreements are potential unilateral contracts *(promise = plea agreement, performance = entry of agreed-upon plea); since plea agreement was revoked before plea was entered, “offer” of plea bargain could not be accepted by entrance of guilty plea
- Offeror: prosecutor, revoked, offeree (Wheeler) can no longer accept
- §87(2): offer is binding when offeror reasonably expected to induce action or forbearance on offeree before acceptance, and does induce such action by offeree *(court found that this did not occur here)*

**Drennan v. Star Paving:** Drennan’s reliance upon Star Paving’s offer makes it irrevocable per §87(2).

- Offer induced action of a definite and substantial character on the part of the Drennan (turned in a bid to third party based on Star Paving’s bid)
- Drennan’s reliance was reasonable and justifiable per §90
- Star Paving’s “mistake” suggests dirty hands/bad faith
INDEFINITE AGREEMENTS, §33
Offers must be sufficiently definite to be valid. (LEONARD, SOUTHWORTH)
However, before courts will throw out indefinite contracts, will first consider whether
the parties intended to be bound.

Varney v. Ditmars: agreement between employer and employee itself is insufficiently
definite (employee would get “fair share” of the profits, nothing stated for if he could not
finish out the year).
- Courts are reluctant to rewrite contracts or “fill in gaps” that are insufficiently
definite, damages the “meeting of the minds” aspect of bargain principle
- Void for vagueness, court cannot help when parties cannot agree on terms of their
own agreement (what constitutes a “fair share” of profits?)
- DISSENT: fair share could be determined, is definite enough to recover

Cobble Hill: Court holds that even if a price for Δ’s property was not expressly laid out in
the contract, there is a mechanism through which it can be determined, thus there is an
enforceable contract.
- Goal of court is to keep parties bound by contract if at all possible, even if price is
not calculated, it is calculable/can be objectively determined
- Buttress this argument with reliance/restitution arguments; Π would be able to
recover under different frameworks anyway, supports idea that this K be enforced

Oglebay v. Armco: court found that, despite insufficient definiteness regarding what to do
when specific pricing mechanism failed, businesses are “agreed to agree” to be bound by
a K due to long standing business practices.
- K’s method of price setting is no longer possible, but it is still possible to
determine some kind of price
- Court can exercise equitable jurisdiction over the parties where it is clear that they
intended to be bound
- SEE §33

CONSIDERATION
Consideration must be given for promise to be enforceable, given in return for either
promise or performance.
- 1st doctrine: any bargained-for performance (including forbearance) or return
promise done for given as inducement for a promise; some benefit given OR
detriment (HAMER v SIDWAY) suffered as inducement for a promise.
- 2nd doctrine: pre-existing duty rule: promise to do something you are obligated to
do or have already promised to do is not consideration (WHITE v.
HOMEWOOD)
- 3rd doctrine: “mutuality of obligation,” each promise must be equally enforceable
(MASZEWSKI; LAWRENCE; §77)

SUFFICIENCY: insufficient if
- nominal
- resulting from pre-existing duty
- past consideration
- illusory
ADEQUACY: inadequate if
- illegal
- shocks the conscience
- opposes public policy

Exculpatory agreements: contrary to public policy when
- employer gets advantage by forcing employee to sign to get a job

Hamer v. Sidway (SUFFICIENT CONSIDERATION): Unilateral, performance is acceptance. Uncle offers $5000 to refrain from certain activities until age 21. Nephew accepts by performing (GOOD FAITH), forgoes a legal right at the request of his uncle; this was sufficient consideration. Uncle’s letter (will hold money w/interest until nephew is older) confirms there was consensus ad idem and that the agreement would be breached when not fulfilled.
- Abstinence/reward case

White v. Village of Homewood (PRE-EXISTING DUTY): agreement was unenforceable due to lack of consideration and for public policy reasons.
- Inadequate: Δ agreement released them from their own negligence
  - Shocks the conscience
- Insufficient: cannot promise to do something you are legally obligated to do; Δs were obligated to give Π the test by statute

Maszewski (illusory promises/mutuality of obligation, §77)
- Both parties did not have a legally enforceable obligation (she could not force him to leave the house because he had a legal right to live there “cannot give up what you do not have”
- Neither could dispossess the other, no consideration on either side
- DISSENT: consideration was that she gave up what she had a legal right to do, which was leave the house

Lawrence v. Ingham Co. (insufficient consideration)
- Π alleging hospital breached contract to provide non-negligent care (because government is immune from torts claims); claiming that her agreement to follow doctor’s instructions and forbearance of right to have an abortion was sufficient consideration
- Court: no, there is a lack of mutuality here (what can hospital sue for? Cannot sue if she does not follow advice) translates into lack of consideration (whether or not she follows advice or has an abortion has no value/benefit to hospital)

Langer v. Superior Steel (mutuality not required)
- Mutuality not required here (defendant cannot sue plaintiff for anything); but consideration is sufficient and therefore K is enforceable
- Company benefits from Langer not working, Langer benefits by being paid (sufficient consideration)

In re Greene (nominal consideration)
- $1 is nominal and therefore insufficient consideration in return for $1,000/month and $100,000 insurance policy
- illusory element: in return for all the stuff, woman “gives up all claims” against man, court finds she had no claims to begin with
2. RELIANCE/PROMISSORY ESTOPPEL

PROMISE (as viewed by promisee)

- §2: promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made
  - person manifesting the intention is the promisor
  - person to whom manifestation is addressed is promisee
  - where performance will benefit a person other than the promisee, that person is a beneficiary
- must be sufficiently definite (STANDISH)
- if there is heightened injustice, lowers standard for whether a promise exists (HOFFMAN, potential dirty hands), this would not fly in bargain

PROMISSORY ESTOPPEL

- §90: promise is binding when the promisor should
  - reasonably expect
  - to induce action or forbearance on the part of the promisee
  - which does induce such action or forbearance
  - if injustice can be avoided only be enforcement of the promise.
- Reasonable people only rely on actual promises (if arguing someone is reasonable, have to show statement is a promise)
- When does a statement rise to the level of a promise?
  - Consider language, words used, and circumstantial context (STANDISH)
  - Position of the promisee, what would they understand? (EMBRY)
  - Would it be unjust if statement NOT considered a promise? (ELVIS - no)
- When is a statement just a statement?
  - Prediction of future events (DMI), mere assurances (LOCAL 1330)
- Two ways to invoke PE:
  - PE as substitute for consideration (O + A + reliance = enforceable K)
  - PE as alternative alternative grounds for enforcing an agreement
- Promisee’s reliance on promise must be
  - REASONABLE (rational, logical in thinking)
  - JUSTIFIABLE (by promisee’s expectations, logical in doing)

PAST CONSIDERATION IS NOT CONSIDERATION

- Something that happened BEFORE a promise is made cannot be consideration for that promise because it is not bargained for
- A promise made after the consideration is given cannot be enforced based on that consideration alone (MILLS v WYMAN)
- Moral obligations are sufficient consideration when
  - When a pre-existing obligation (debt)
  - Becomes inoperative by law (voided by bankruptcy, incurred by infant)
  - And initial promise is revived (need a valid K at the outset, or cannot be brought back)
- Examine original transaction if there contemporaneous inducement or exchange
**Standish v. Curry**: based on prior relationship with Bank, court finds Currys reasonable rely upon their statement that “the bank would support them,” believed this was a promise for an upcoming loan.

- Standish: Bank made clear manifestation that it would continue to extend credit, material terms of loan could be determined from nature of transaction and prior course of dealings
- Bank: no record of this
- Court: §90, bank should have reasonably expected to induce action by Standish (forbearance of buy-out option)
- Ambiguous/missing terms not essential to the reliance, won’t preclude recovery as long as a method exists to determine K terms in the future
- Position of PROMISSEE important!

**Hoffman v. Red Owl Stores**: Hoffman substantially invested in opening Red Owl store (sold business, moved, down payment on lot), court adopted §90 to show that Red Owl is estopped from going back on a series of “string along” promises.

- Promissory estoppel a substitute for consideration, renders gratuitous promise a K
  - When terms not laid out and there is NO MEANS by which to determine what they might have been (see STANDISH)
- Offer + acceptance + reliance = enforceable; detrimental reliance = consideration
- Not entitled to lost profits of future store – damages only to prevent injustice
- Injustice would result if Π not granted relief because of failure by Δ to keep promises which induced Π to act to his detriment

**DMI v. Abbington**: Oral statements made by DMI did not rise to the level of an enforceable promise.

- Statements not sufficiently definite; lack of agency
- Agreement was reduced, difficult to enforce contradicting oral statements
- Only DEFINITE promises are capable of creating reasonable inducement
- Press releases ARE NOT promises, merely statements

**REASONABLE RELIANCE**

**Jo Laverne Alden v. Elvis Presley**: Alden is suing Presley’s estate to enforce a gratuitous promise to pay off the mortgage on Alden’s home.

- There was a sufficient promise (promissory estoppel could have rendered it enforceable despite lack of consideration if she had suffered detriment, but court says she did not because she did not tell divorce court why she assumed responsibility for the mortgage)
- Induced reliance: Alden gave up remedies available to her in divorce proceedings that would have helped her pay off mortgage; however, she should have informed the court that the reason she did this was in reliance upon Presley’s promise
- Reliance on promise following Presley’s death was unreasonable
- One can unreasonably rely on a promise if the facts/circumstances demonstrate unjustified behavior towards a promise.

**PROMISES RECOGNIZING PAST BENEFIT, (§86 rarely adopted)**

**SEE SYNTHESIS, Class Notes on 10/8**

**Mills v. Wyman**: A’s moral obligation to pay for adult son’s gratuitously given medical expenses not legally enforceable as a promise, neither is his promise to do so after the medical care already given.
o Promise was made without consideration
o Services not bestowed at request of ∆

**Webb v. McGowin**: exception to the past consideration is no consideration rule.
o Moral obligation is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit
  o Promisor (Π) saved promisor’s life (∆), sufficient consideration for subsequent agreement to pay for the service, **material benefit received**
o **Note**: reason why this exception is rare
  o Relationship between parties (done in scope of employment)
  o Ratification of the promise (he paid for 8 years)

**Harrington v. Taylor**: Π saves ∆ from getting head cut off in a domestic dispute, by using her hand to catch the axe.
o Court finds Π was a volunteer, act was gratuitous
o Less evidence of intent to pay by ∆ than in Webb
o The different relationships (domestic v. employment) also distinguishable

**Sedona v. Valley Bank/Transamerica/Peterson**: Blackburn lists property with Sedona, Peterson offers on house after listing expires by its own terms.
o Π can still get a commission for PREVIOUSLY listing Blackburn’s property per §86(g): subsequent written agreement for previous services rendered is binding

### 3. Restitution/unjust enrichment:

**Contract implied in law**: a legal fiction created by courts, does not require many of the bargain principles (no meeting of the minds, no mutual understanding, no promise)

**Quasi-contract**: services performed, whether requested or not, have benefited a party. Communication between parties are not required;
o promise is implied only in circumstances where person giving the benefit could reasonable expect payment.

**Quantum meruit** = market value of services
**Quantum valebant** = market value of goods

Test:
o benefit is conferred, accepted and/or retained by recipient
o benefit is not conferred as a gift, gratuitously
o in fact, benefit is given with expectation of compensation
o benefit is not given officiously (unjustifiably forced upon recipient)

**Sceva v. True**: even though True is incapable of contract, court found a K implied in law. Burden is upon estate of Sceva to show that he expected payment in conferring the benefit of mental health care upon her, and that he acted in good faith (was not officious)

**Bailey v. West**: in trying to receive payment for maintenance of horse, Bailey found to be officious intermeddler
- accepted the horse when its ownership was in question
- knew that West was renouncing ownership of the horse, continued to maintain it
- question of agency, Kelly’s decision not representative of West’s choice
Dews v. Halliburton: several contracts (Crystal → Dews → Massey → Halliburton) in order to determine if oil well is producing. Halliburton has no privity with Dews, cannot sue under bargain principle or reliance, has to go to unjust enrichment, quasi-contract.

-Dews knew he was being unjustly enriched, allowed it to happen

**VOID vs. VOIDABLE Ks**

Review: do the parties have

**Volition**: are they truly free to exercise will in marketplace?

**Capacity**: do parties have essential capability in legal sense

**Equity**: underlies capacity doctrine – the more unequal a K is, the more unlikely it is that a person with reasonable capacity would have entered into the K

VOID:
- legal minors (§12) – HALBMAN
- mentally ill (§15) – SHOALS FORD
- fraud
  - Factum
  - Inducement (what motivated parties to bargain was a lie) KANG
  - Concealment
- illegal – BABY M

VOIDABLE:
- Duress (economic or physical) – SOSINOFF, LORNA BOND
- Undue influence – JEANES
- Unconscionability – WILLIAMS, WEINER
- Failure to disclose – HAUNTED HOUSE, TERMITE HOUSE
- Mistake – BAPTIST CHURCH
- Misunderstanding – IZADI, §20
- Misrepresentation (short of fraud) – FLIGHT CONCEPTS, ARTHUR MURRAY

4. Restrictions on Power to Contract

SYNTHESIS:
The doctrines of illegality, void for public policy, and lack of capacity (for age or mental illness) can be raised both as contract defenses (for breach of action, to get out of an agreement) and as a basis for K rescission (to get rid of or reform a K that no one has breached). All of these doctrines restrict the power of parties to contract in some way. Under the doctrine of illegality, courts will not enforce contracts that facilitate criminal activity. For example, Ks that attempt to contract around statutory law, or Ks who subject matter involves something illegal, will not be upheld by courts (*Baby M*). Courts will also review Ks through the lens of public policy, and will refuse to enforce Ks that they find to be in conflict with the public interest or public need (*Baby M*); conversely, courts
reserve the right to enforce disputed Ks when they serve the public interest (AC v. CB). Frequently these types of public policy decisions occur when the court acts in parens patriae to determine what is the best interest of a vulnerable party, such as a child (Baby M, AC v CB). Parties are also restricted from contracting when one or more party is legally incapable of contracting, per R§12. Specifically, children are legally incapable of contracting until reaching maturity, rendering contracts made with children voidable at their option. They may disaffirm Ks at any time and are only required to make restitution as much as they are able (Halbman). Contracts made with the mentally ill are similarly voidable per R§15 (Shoals Ford). Both children and the mentally ill can ratify contracts such that they are no longer voidable upon a changed circumstance; for children, this can occur upon reaching maturity (either expressly or impliedly through continued performance), for the mentally ill, this can occur if mental capacity is recovered.

- Can be raised as a defense to a breach of contract action, so that a court will not enforce an agreement
- OR, can be used as a basis for rescinding or reforming a K that no one has breached

**DOCTRINE OF ILLEGALITY/VOID FOR PUBLIC POLICY**
- Illegality: Court will not enforce contracts that facilitate criminal activity
- Public Policy: Court will refuse to enforce contract that does not violate a statute but nevertheless conflicts with public interest/need
- Parties should be allowed to breach where it is efficient to do so
- “Bad man” theory of K (Holmes): if it’s better to breach, breach

**BABY M:**
- Π seeking specific enforcement of contract (surrender of child) in a surrogacy agreement with Δ, who are refusing to give up the child
- K terms are clear, offer/acceptance/consideration, reduced to writing

**CORE LEGAL CONCEPTS**
- **Best interest of the child/parens patriae** (court acting as the “father,” on behalf of the child which cannot help itself)
- **Volition, capacity** (primarily of Mrs. Whitehead, who agreed to contract before she had full volition or capacity)
- Court finds K unenforceable
  - Direct conflict with existing statutes regarding adoption
    - Law prohibits money in connection with adoption (avoid “baby bartering” or sale of children)
    - Law requires proof of parental unfitness or abandonment of parental rights before child can be adopted
    - Law makes surrender of custody and consent to adoption revocable in private placement adoptions
  - Conflict with public policy
    - Contract’s premise does not have best interest of the child in mind; Natural mother is irrevocably committed before the birth of the child
    - K is unlikely to survive without money; court finds this abhorrent since the subject of the K is a baby
• K might lead to people “selling” unwanted pregnancies to the highest bidder, not necessarily the best parents
• Adoption should not be profit motivated
• Mrs. Whitehead’s consent is irrelevant, the K is set up to undermine free will/capacity
• There are values that society deems more important that granting wealth to whatever it can be, be it labor, love, or life

  **TAKEAWAY:** Court found that you cannot contract around legislative intent, even if the contract is otherwise valid and enforceable. Court also found that valid Ks can be unenforceable if the subject matter is found to be of such societal value that it cannot be bought or bargained for in a contract.

**AC v. CB**

Lesbian partnership dissolves, non-biological mom is seeking custody rights of child from biological mom who is denying any agreement between them.

  • Parental agreements involving child custody are not void just because the parties are not natural parents (subject to judicial modification for best interests of the child)
  • Sexual orientation does not automatically render a person unfit to have custody of a child
  • Issue: whether and how a parent’s sexual activities affect the child; this is a question of fact, not a matter of law based on perceived immorality

  **TAKEAWAY:** Court reserves right to determine best interest of the child (*PARENS PATRIAE*) based on objective evidence; custody rights will be granted based on the best interest of the child.

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**BROADER REACH OF BABY M/AC v. CB: SYNTHESIS**

In light of doctrine of illegality/public policy, courts will determine the enforceability of contracts based upon broader interests than the parties directly involved in the contract. *Baby M* indicates that courts reserve the right to render contracts unenforceable even when basic contract principles are all present (offer, acceptance, consideration, consensus ad idem). Courts will strike contracts in this way when broader interests (specifically, the interest of a child unable to help itself) are directly concerned with the contract. On the other side, courts are willing to enforce contracts whose validity is questioned when broader interests (BIOC) would be better served if that K is enforced (*AC v. CB*). These doctrines allow courts to look beyond the interests of the parties directly involved in the K, and modify, strike, or enforce the K based upon broader interests it finds relevant or affected by the K.

**LACK OF CAPACITY – R§12**

  • Children and mentally incapable are legally incapable of contracting
    o Rationale: bargain principle of K assumes that rational actors engage in market transactions to maximize profits/act in their best interest
    o This doctrine protects those that the law views as incapable of acting in their best interest (*PREVENT EXPLOITATION*)
• Contracts with minors for items **which are not necessities** are void or voidable at the minor’s option
• TWIST: minors, upon reaching maturity, can ratify/affirm contracts (if K is based upon performance, continued performance can be implied affirmation)
  o Same goes for mentally incapable people who recover capacity
• R§12: **one cannot be bound by a K if one is incapable of contracting**, including:
  o Someone under guardianship
  o An infant (under 18 unless otherwise by statute) – R§14
  o Mentally ill/defective – voidable if (R§15)
    ▪ Unable to understand nature/consequences of K
    ▪ Unable to act in reasonable manner in relation to K, and other party has reason to know of condition
      □ Where K has fair terms and other party **does not** know of mental incapacity, K is only voidable if avoidance is not unjust (courts get to decide)
  o Intoxicated – R§16, voidable if
    ▪ Unable to understand nature/consequences of K
    ▪ Unable to act in reasonable manner in relation to K

**HALBMAN v. LEMKE -- §§12 and 14**
• Minor disaffirms contract for purchase of item which is not a necessity; having returned the item, should the minor have to make restitution for damage to the item which occurred prior to the disaffirmance?
  o NO, minor does not have to make restitution (as long as no misrepresentation or tortious damage has occurred)
  o Minor is expected to restore as much of the consideration as possible as that which remains at the time of disaffirmance
  o Cannot be required to make restitution for more that what is in minor’s possession
  o Infancy doctrine protects children against this
• **TAKEAWAY**: Do not contract with minors, as they can disaffirm at any time without having to give a reason, and they are only required to make as much restitution for lost value of consideration as they are able

**SHOALS FORD v. CLARDY -- §§12 and 15(1)(a) and (1)(b)**
• **NON COMPOS MENTIS** (insane/incompetent)
• Wife of mentally ill man wants to disaffirm contract to buy a car made while husband was having a manic episode
• Court finds there was sufficient evidence to prove that man was mentally incapable during the period when the contract was made (separate dates when he entered negotiations, and Π and Δ alleged dates when K was completed)
  o Ford dealership had notice that he was mentally ill and continued with the K, potential dirty hands (daughter had called dealership and warned them he would not be able to make payments and that he was manic)
“A party cannot avoid a K on ground of mental incapacity, unless it can be shown that his insanity was of such character that he had no reasonable perception or understanding of the nature and terms of K”

- episodic mental illness can still make a K voidable if the K was formed during a mental episode

5. Market Misconduct or Error
DURESS: when pressure on someone is so great they are rendered incapable of contracts (economic OR physical)

- Economic: economic duress make a K voidable when the party making the claim was forced to agree to the K by means of wrongful threat, precluding the exercise of free will. Demonstrated when:
  - There is proof that one party to a K has threatened to breach the agreement by withholding performance
  - Unless other party agrees to a further demand
  - Such breach would result in irreparable harm or injury to the non-breaching party
  - IF these conditions met, K MAY BE VOIDABLE
    - Injured party must seek financial alternatives
    - If injured party plans on disaffirming K, must do so promptly or will be found to have affirmed/ratified K
      - UNLESS injured party can show they are under continued duress during period of alleged affirmation (SOSNOFF)

- **Sosnoff v. Carter:** Carter and Sosnoff were business partners in a construction project, Sosnoff backed out at crucial moment right before loans were scheduled to go through, threatening collapse of the project (Carter was faced with loss of millions of dollars either way). Sosnoff then offered to loan Carter the money under oppressive terms; Carter sought other means but could not find a bank to lend him the money to go through with the deal. Carter followed terms of the agreement, stopping payments only when he felt such action would not force him to default on other loans as well.
  - “where during the period of acquiescence of at the time of the alleged ratification the disaffirming party is still under the same continuing duress, he has no obligation to repudiate until the duress has ceased.”

- Physical:
  - **§174: K IS VOID** – where conduct that is the manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, that conduct is not an assent, no K was ever formed
    - Ex: physically taking someone’s hand and forcing them to sign a contract
  - **§175: K IS VOIDABLE** –
• 1) where manifestation of assent is induced by improper threat by other party, leaving victim with no reasonable alternative, K is voidable (no meeting of the minds)
• 2) manifestation of assent is induced by one who is not a party to the transaction (THIRD PARTY, NO K PRIVITY), then K is voidable UNLESS the other party to the transaction, in good faith and with no reason to know of the duress, gives value or relies materially on K

○ §176: definition of improper threat

○ Lorna Bond
  ○ EXCEPT to §175(2). Lorna Bond is forced to guarantee a loan by her abusive husband without knowing what she signed; other party did not know of the duress. Court held that when duress is “so excessive as to subjugate and control freedom of will, K may be avoided.” Victim, when deprived of moral and free agency due to duress/compulsion, may be too weak to resist and thus not responsible for K. *Brown v. Pierce* test:
    • Actual violence not necessary to constitute duress; if there is compulsion, there is no actual consent, not substance to the contract when assent is obtained through threats of battery
    • Test for duress: whether the threat made is one that would be sufficient to “overcome the will” of the person alleging duress.

**UNDUE INFLUENCE**
• Ks are voidable in the absence of affirmance, falls under equity section of VCE test; results in assent to a contract that victim would otherwise not have assented to
• Relationships for undue influence (greater degree of trust)
  ○ Spouses/lovers
  ○ Religious leaders/congregation
  ○ Doctor/patient
  ○ Attorney/client
  ○ Fiduciary relationships

• §R437 (first): where one party is under the domination of another, or by virtue of the relationship between them is justified in assuming that the other party will not act in a manner inconsistent with his/her welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.

• *Ferguson v. Jeanes*:
  ○ Nancy Ferguson seeks to quiet title to John Jeans (lover and Christian Science leader); Jeans asked to be named partner in the apt signing, when she refused he said she was ungrateful and not capable of making the payments alone; she consented, and her name went in everything that involved payment (he never paid any money). She tolerated delays in his payment, believing he would pay, until they broke up (then she sued). Persuasion is unfair or influence is undue
only when it overcomes the will of another such that her own free agency is destroyed.

FRAUD:
- In factum (Kang, Ryan)
- Inducement (Brooklyn Gas)
- Concealment (Hill v Jones, Ackley)

UNCONSCIONABILITY
- Procedural (Ryan, Brooklyn)
- Substantive (Williams v. Walker)

MISREPRESENTATION: contracts are voidable if they are formed as a consequence of misrepresentation. Can be grounds for rescission, basis for breach, action to reform K, other for claims for fraud. K is unenforceable when

1) One party makes a statement relevant to the exchange that is false
   - DOES NOT require proof that the “misrepresenter” knew of the falsity of the statement, so long as it is material
2) Aggrieved party relied on the false information in entering into K
   - Aka, materially led party to accept the contract (the misrepresentation was a substantial factor)
   - “but-for” misrepresentation, would Π have entered into K?
3) Aggrieved party’s reliance was reasonable or justifiable
   - Answer depends in part on the relationship between parties
   - To what extent did the aggrieved party have a duty to investigate?

- Misrepresentation must relate to a pre-existing fact; cannot be about a future speculation or a judgment (a “bad deal” is still a deal)

**Kang v. Harrington**: Δ misrepresented terms in a K, told Π he was in a hurry so that she signed documents without carefully reading (negligent), which gave him a lease different that what had been agreed upon and for different property.

- “Where it appears that one party has been guilty of an intentional and deliberate fraud, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable and diligent care”
- aka, when you commit contractual fraud you cannot claim the other party’s negligence in failing to discover the fraud will bind them to the K
- **Dolly Won had duty to investigate, but Harrington’s intentional and deliberate fraud overwhelms that duty, court holds for Won**

**Flight Concepts v. Boeing**: 
- Flight Concepts entered into negotiations with Boeing to sell a plane model where Πs would receive a royalty for every plane Δ produced, Δ never sold/produced any planes and then terminated K. In K Δ retained right to terminate K and is relieved of any obligation to produce or sell (potentially illusory).
- Π alleges that Δ made oral promises; since K was reduced to writing, court held that oral promises could not be relied upon (parole evidence rule?):
“where the written contract directly contradicts the oral promise made during contract negotiations, the oral promise cannot be construed as fraudulent.”

- Court rules that \( \Pi \) had duty to read the K, had opportunity to do so and access to counsel to explain terms

**Vokes v. Arthur Murray**: woman pays excessive amounts of money to continue dance lessons, dance school misrepresents to her that she has great talent and will be a real dancer if she continues

- Also includes undue influence: “constant and continuous barrage of flattery, false praise, excessive compliments”
- All fourteen Ks were “procured by \( \Delta \) by false representations that she was improving her dancing ability…her true ability was withheld from her with the sole and specific intent to deceive and defraud \( \Pi \) and to induce her to enter into Ks”
- EXCEPTION: usually misrepresentation must be one of fact, not opinion. In this case, \( \Delta \)’s superior knowledge about dancing makes its statements ones of fact when dealing with someone without that superior knowledge (opinion if someone with same knowledge). Also, doesn’t apply with fiduciary relationship
- NOTE: is this “mere puffery” per Leonard? Could you dismantle the K in a less derogatory way?

**MISREPRESENTATION SYNTHESIS**

**FAILURE TO DISCLOSE (§161)**

Often relates to real estate contracts, arms-length transactions

Negotiators not obligated to share information; treated as valuable property

**EXCEPTIONS**

- When parties are in a fiduciary relationship
- Duty to disclose when partial info has been given (half truth = misleading)
- **DUTY TO SPEAK**: when there are facts known to one party that would materially affect the transaction
  - If someone asks, duty to FULL DISCLOSURE
- **vs. CAVEAT EMPTOR**: “let the buyer beware.”
- **§161**: duty to disclose when:
  - a) disclosure of fact is necessary to prevent misrepresentation, fraudulent, or material
  - b) disclosure of fact would correct mistaken assumption, non-disclosure results in failure of good faith
  - c) disclosure would correct a mistake in the writing
  - d) other person entitled to know due to fiduciary relationship

**Hill v. Jones - termites (§161)(b)**

- Issue is whether the seller had duty to disclose termite damage which **materially** affects value of house
- Seller has important knowledge that the buyer lacks, dirty hands
- YES, the damage was material,
  - Modern trend: affirmative duty to speak
o Traditional: caveat emptor

- EXAMINE:
  o What is the relationship between the parties
  o What is the type of harm (omission or commission?)
  o How material was the fact that was not disclosed?

**Stambovsky v. Ackley/Ellis Realty (ghosts)**
- Issue is whether caveat emptor applies when the buyer bought “haunted house,” or whether sell had duty to disclose
- Generally non-disclosure is not misrepresentation where Π had equal opportunity to obtain info (Prosser)
- NY does not impose duty to disclose unless
  o Confidential or fiduciary relationship
  o Active concealment
  o Affirmative misrepresentation
  o Partial disclosure
- Caveat emptor usually relates to
  o Defects in title
  o Lien against property
  o Expenses or income
  o **Factors affecting operation of property or business**
    - Value of house in this case affected by info affirmatively disseminated by seller
    - Other factors: murder, suicide, fire, etc

- **Test for rescission**
  o Where condition created by seller materially impairs value of K, is peculiarly within knowledge of seller (or unlikely to be discovered by prudent purchaser) = basis for rescission
  o Compare with *Flight Concepts* reasoning (affirmative duty to investigate – where do you draw the line?)
  o “aspirational” reasonable person: there are limits to what a reasonable person would do (might not have a duty to investigate to see if a house is haunted)

**MISTAKE OF FACT: effect of distortion of information, §151**
- §151 (mistake defined): a mistake is a belief that is not in accord with the facts
- §152: MUTUAL MISTAKE (OLIVER neck injury)
  o 1) when both parties have a mistaken assumption material to the K, K is **voidable** by adversely affected party unless §154
  o 2) to determine whether mistake is material, take into account if other relief is possible (reform K, restitution)
- §153: UNILATERAL MISTAKE (BAPTIST CHURCH)
  o contract is **voidable** if one person has made a mistake material to the K if:
    - effect of mistake makes enforcement unconscionable
    - other party has reason to know of or caused mistake
- §154: when party bears risk of mistake
risk is allocated to him by agreement of parties
  - when party is aware of limited knowledge of K but treats limited
    knowledge as sufficient
  - risk is allocated to him by court on grounds that circumstances make
    this reasonable

*Oliver v. Clark (car accident/neck injury) – mutual, §152*
- A release may be set aside if there is a mutual mistake or when injuries of a
  serious nature are the core of the transaction
- **NOT MISUNDERSTANDING**, because extent of the injuries is EXTERNAL
  TO THE K (parties had no misunderstanding about the terms of the K)
- Mistake was wholly unknown to the parties, and not considered in executing
  the release
- Greater concern is for equity here; courts “hiding behind” concern for
  inadequate consideration (public policy argument)

*First Baptist v. Barber (building church) – unilateral §153*
- Compare/distinguish from Drennan v. Star Paving
- Barber is entitled to rescission based on unilateral mistake regarding pricing
  for church construction, enforcement would be unconscionable
- Π could not have relied upon Δ’s promise (UNLIKE DRENNAN, §90),

**UNCONSCIONABILITY, UCC §2.302**
- New doctrine, where a K may be unfair, but there is no threat or duress claim,
  and relationship is not one where undue influence could be found;
  misrepresentation might not rise to the level of fraud
- Associated with Ks of adhesion (standard form Ks with non-negotiable terms)
- Renders K VOIDABLE, attempts to render justice to vulnerable parties
- UCC §2.302: If the court as a mater of law finds the K or any clause to have
  been unconscionable when made the court may refuse to enforce the contract.
  **Basic test**: is whether *in light of the general commercial background and the*
  **commercial needs of the particular trade or case, the cases involved are so**
  **one-sided** as to be unconscionable under the circumstance existing at the time
  of the making of the contract.

- **Procedural “bargain naughtiness”:** circumstances around K formation
  - Did parties have meaningful choice
    - Reasonable opportunity to learn/understand terms (fine print, confusing
      terms)
  - Gross inequality of bargaining power
  - Asks whether bargain principles were damaged

- **Substantial “evil terms”:** problems with actual K
  - Were there “evil terms” that shocked the conscience?
  - Was the K commercially unreasonable?
  - Do terms unreasonably favor one party?
  - Is a review of adequacy of consideration justified?

- **Unconscionability challenges several K doctrines**
  - Duty to read
  - Not inquiring into adequacy of consideration
  - Assumption that bargaining is on equal/mutual terms
Idea that custom/social practices are mere supplements to negotiated K (take larger role here in determining what people expect from one another)

Williams v. Walker: Π signs contract of adhesion to buy stereo, terms allow furniture store to take back all her furniture she’d bought from the store if she defaulted on the one purchase.
- When party of little bargaining power (thus little choice) signs a commercially unreasonable K with little knowledge of terms, not likely party can actually give consent to those terms (disrupts consensus ad idem)
- In these cases review of adequacy of consideration is allowed

Ryan v. Weiner: Π falls behind on mortgage payments and is about to be foreclosed. ∆ arrives (out of the blue, unknown to Π beforehand), what was said is disputed, but what resulted was that ∆ got Π to sign papers that he did not read/understand to transferred the deed of the house to him, Π continued as a renter. Π transferred ownership of his property without receiving any part of the financial value, AND remained personally liable for paying off the mortgage balance
- Courts will not inquire into the adequacy of consideration unless it shocks the conscience, can infer fraud when consideration is inadequate
- Position of parties suggests extremely unequal bargaining power
- UNILATERAL MISTAKE: can rescind K if based on unilateral mistake §152 if
  o enforcement would be unconscionable
  o mistake relates to substance of K
  o mistake occurred regardless of ordinary care
  o possible to place other party in status quo (real estate = easier)
  o If Π is vulnerable, burden on ∆ to ensure Π understands term

Brooklyn Gas v. Jimenez (language barrier): Non-English speaking landlord induced to sign a K to buy machine; clear that he didn’t understand the terms; asked for interpreter and not given one despite the availability of one. Seller brings suit for payment, court finds K to be unconscionable
- Basic test: were all parties equal at time of K creation? NOT HERE
- ∆ was not looking for a K, induced to participate
- protect those who are unable to protect themselves

Nez Perce v. United States: Π were induced, given pressure from the government, to sell land to the United States at a certain price. They are appealing because they calculated the land had been sold well below adequate price.
- Discussion of whether the sale price of the land was unconscionable, whether consideration was merely inadequate or GROSSLY inadequate enough to shock the conscience
- Court can pierce valid K when terms are shocking
The doctrine of unconscionability provides that if a court finds a contract or clause within a contract to be unconscionable (meaning it shocks the conscience), it may refuse to enforce the contract (per UCC §2-302). Courts generally embrace this doctrine where it is applicable, but may be reluctant to invoke it unless the circumstances present such an extreme scenario that to enforce the contract would indeed be unconscionable. This is because the doctrine of unconscionability in effect undermines several tents of contract law, including the duty to read; that courts should not inquire into the adequacy of consideration; the assumption that parties negotiate and make and accept offers on equal footing; and that customs and social practices are mere supplements to a negotiated agreement. However, when all of the facts suggest a level of unfairness that is extreme, courts may choose to set aside these principles of contract law by declaring the contract voidable due to unconscionability.

There are two types of unconscionability. The first is procedural unconscionability, which involves “bargain naughtiness” or extreme fact scenarios at the bargain stage of a contract. Procedural unconscionability may exist when one party appears to be taking predatory advantage of another’s physical or circumstantial vulnerability, such that the vulnerable party willingly enters into a contract that they do not read or understand, thus neglecting a standard of ordinary care (Ryan, Brooklyn Gas). A vulnerable party may act in this way because they trust the predatory party’s superior knowledge (Ryan) or because they simply cannot understand the predatory party (Brooklyn Gas). Courts prefer to grant unconscionability in these procedural cases because they prevent a meeting of the minds; if one party does not understand the terms of the agreement, there can have been no consensus ad idem.

Substantial unconscionability relates to the “evilness of the terms” of a contract; in other words, it refers to the unsavory results that an unconscionable contract might produce. This may occur when the terms of an agreement overwhelmingly favors one party (Williams v Walker-Thompson, Nez Perce), and/or “trap” a party into an agreement that favors the other party (Williams v Walker-Thompson).

6. Interpretation of Contracts

IMPLIED TERMS:

a. Rarely possible for parties to articulate every term into Ks
b. Especially important in specific trades or when parties have previously contracted with each other (unspoken expectations not in K)
c. Focus on
   i. Trade practices, community norms, regular routines (question of fact! Must be sufficiently definite)
      1. What is the scope of these usages?
      2. Extent of prior use of usages?
      3. Do they negate or modify express K terms?
   ii. Best efforts, good faith, similar communal norms
   iii. Interpretive presumptions, implied terms that courts sanction

_Nanakuli v. Shell_ (trade practices/community norms): issue is whether Shell had duty to continue price protection given the trade practices, norms, and prior dealings with
Nanakuli (Hawaii had specific situation relating to asphalt industry), and whether you can expand the K based on trade custom in light of express provisions in a K
  - UCC binds parties to usages of parties and trade usages in a given locality
  - Look beyond the written document if trade practices can reconcile contradiction in terms vs. actual performance
  - Usage can modify a term as long as it does not totally negate it
  - DEPARTS FROM TRADITIONAL PAROLE EVIDENCE RULE

**Fisher v. Bnai Congregation** (norms): Court held that ancient Hebrew law can be read into a K as implied terms, allows rabbi to get restitution because he refused to perform high holidays ceremony due to practices of particular synagogue.
  - Parties contracted with common understanding of what “orthodox” meant in Jewish community, meaning was implied in the K

**GOOD FAITH. §205, UCC §§1-203, 1-106(2)**
  - Courts interpret Ks to impliedly include obligation of good faith/fair dealing
  - Cardozo: Ks have an implied obligation of best efforts as necessary element to make parties’ arrangement effective; consistent with shared values of reciprocity.
  - Looking outside “four walls of K,” how is K interpreted and how did parties act in relation to K?
  - Best effort/good faith flows up into consideration, build parameters of good faith to insure value of consideration
  - If a party acts irrationally/capriciously/arbitrarily, may be in bad faith

**Reid v. Bank of So. Maine**: Π saying that Δ bank acted in bad faith by limiting and later terminating their credit.
  - DEMAND PROVISIONS: (UCC §1-208); part can accelerate payment or performance, or require collateral “at will” OR when he deems himself insecure; shall have power to do so only if he in good faith believes payment is impaired.
  - Bank cannot terminate agreement capriciously; documents establishing loan did not preclude bank’s obligation to act in good faith
  - Discussion about standard of good faith: objective standard, honesty in fact
  - Breach when bank is found to have treated Reids differently than other bankers

**Dalton v. ETS**: Issue is whether ETS complied with its own procedures in refusing to release Π’s scores, and whether they consider the relevant info submitted by Π to explain score discrepancy → court found they failed to consider (how does one sufficiently consider?) information submitted by Π, breached K by not acting in good faith.
  - Implied obligations include any promises which a reasonable person in the position of the promisee would be justified in understanding were included
  - Δ’s discretion cannot be exercised arbitrarily or irrationally
  - no duty to initiate an external investigation into a score, the K did require that they CONSIDER any relevant material supplied to explain score
    - court found ETS had refused to exercise its discretion in reviewing submitted materials, subsequent breach of good faith
    - release would not be performance of K, since ETS allowed to withhold score → performance would be CONSIDERATION of score

**K and administrative law:**
courts do not inquire into discretion of specialized agencies unless there is a breach of good faith, capricious, irrational, based on whim, arbitrary
because the credibility of these orgs is important, courts rarely inquire

**PAROLE EVIDENCE RULE**
- assumes that parties will sometimes want to give special authority or significance to a written statement of some or all of their agreement and purpose to carry out this desire by excluding evidence that would conflict with such a writing.
- **FINAL (PARTIAL INTEGRATION):** writing is a final statement of the terms state in the writing, but not complete, meaning evidence of prior or contemporaneous agreement that conflict with the written terms should **not** be admitted, but are allowed to **supplement**
- **FINAL AND COMPLETE (FULL INTEGRATION):** terms in the statement are meant to be final and complete, no prior evidence can be admitted regarding of the circumstances surrounding the transaction. **UNLESS:**
  - term is ambiguous and needs explanation
  - trade usage/course of dealings are related
  - also, subject to K defenses
- **HOW TO DETERMINE:**
  - Prior negotiations
  - Sophistication of parties
  - Extrinsic evidence
  - Is this a K of adhesion? Was there opportunity to bargain?
  - Was there a merger/integration clause? (likely to be bound to it unless invalidated by K defenses)

**Betaco v. Cessna Aircraft:** court found K was fully integrated (final and complete), meaning Betaco could not bring in extrinsic evidence that would allow him out of the contract (plane did not meet the specifications that he thought they did, wants cover letter to be entered as “consistent additional term” to the K)
  - Court: K was not one of adhesion; parties sophisticated, had = bargaining power
  - was the term in question (range of jet) one that parties (by its exclusion) clearly meant to be left out of the K? \( \langle \) here can’t be determined by summary judgment
  - remanded to determine if prior conversations destroy K’s integration
  - **TAKEAWAY:** what kinds of facts influence whether a K is integrated

**7. Changes After Contract Formation**

**FRUSTRATION OF PURPOSE:**
- party can be excused from a K because of a change in circumstances that thwarts the fundamental purpose or destroys subject of a valid K

**Brenner v. Little Red Schoolhouse:** while father did not receive full consideration of the K (actually having the son in school), school’s partial performance was enough that he cannot be excused based on frustration of purpose (divorced wife sent son to different school).
  - Subject of K not destroyed (son is still alive, technically COULD go to school)
  - This circumstance was negotiated around in the K (tuition was non-refundable); thus he cannot recover under impossibility/impracticability
Analyze exchange of consideration: was what was performed sufficient to render the K valid, or is K unjust if enforced?

**IMPOSSIBILITY/IMPRacticalITY OF PERFORMANCE, §§261-3**

- Party can be excused from K when circumstances have changed so as to severely increase the difficulty of performance (even though it might technically be possible)
- §261: after a K is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.
- §262: death or incapacity of person whose performance is necessary for the K will cause that K to be impossible/impracticable, when the non-occurrence of death/incapacity was basic assumption of K
- §263: if the existence of a specific thing is necessary for performance, its failure to come into existence, destruction, of such deterioration as makes the K impracticable (when its doing so was basic assumption of K)
  - was the event causing impossibility/impracticality foreseeable, or extremely remote?
  - Is the party asserting the doctrine at all at fault?
  - Is the subject of the K unique? (§263)

*Specialty Tires v. CIT v. Condere, §§261, 263*: became impractical for CIT to deliver the subject of the K with Specialty Tires due to completely unforeseeable circumstances that parties are not expected to have contracted around (could not have foreseen Condere would have tried to hold onto tire presses at the last minute in defiance of bankruptcy findings)

*Portland Council of Jewish Women v. Sisters of Charity*:
  - Courts dislike perpetual Ks, but here it finds that K assumed risks appropriately, rising costs due to inflation were within original contemplation of the parties
  - Expense will not allow for excuse from a K (Rfirst§437)
  - Test for extremity must be so extreme as to be outside reasonable contemplation of parties
  - DEFENSE OVERLAP WITH MISTAKE, UNDERSTANDING

*Cazares v. Saenz §262*
  - §262: person necessary to K (one of the attys who then become a judge) became incapable of performance, will necessarily make K impractical
  - Π is saying the other side breached K due to impossibility, he did not breach them by not paying attorney fees. Not denying that he was unjustly enriched if he didn’t pay, just didn’t want to pay the bargained-for fees since K became impractical
  - Court determined “pro-rata” rate, not original fees, based in restitution
    - Just because something becomes impractical does not allow one party to be unjustly enriched
  - CONSIDER ORIGINAL CONTEMPLATION OF PARTIES

**AGREED-TO MODIFICATIONS/PRE-EXISTING DUTY RULE**

- Pre-existing duty rule: promise to do something one is already obligated to do cannot be sufficient consideration for a return promise
- Contract modifications are thus not enforceable without additional consideration
  - Would be *nudum pactum*
  - Courts trying to discourage bad faith Ks, illegal Ks
  - Such Ks are VOID
- Not true for the rest of the world
- WAIVER: one can waive a right to additional consideration, but past waiver is (like past consideration) invalid, and agency matters regarding who is waiving
  - Must be a voluntary relinquishment of a known right at the time a request is made for the foregoing of the contract, CONTEMPORANEOUS
- Consider:
  - Whether there was coercion or unjustifiable advantage by party demanding modification
  - OR, if there was a voluntary rescission and modification by parties

*Alaska Packers v. Domenico*
- Fishermen demanded additional payment upon arriving at site after K was formed, company could not get other fishermen and thus consented to Pi's demands, NO AGENCY, not supported by additional consideration
- Could not lay grounds for estoppel based on own wrong