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Cover Page Footnote

Chunlin Leonhard is the Leon Sarpy Distinguished Professor of Law at Loyola University New Orleans College of Law. I would like to thank Loyola University New Orleans College of Law and Leon Sarpy Professorship for their support of this research project. I am especially grateful to my research assistant Ms. Brooke Hathaway for her competent and timely research assistance. The opinions expressed herein are mine alone.

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THE INCONSISTENCIES OF CONSENT

Chunlin Leonhard[+]

U.S. legal scholars have devoted a lot of attention to the role that consent has played in laws and judicial consent jurisprudence. This essay contributes to the discussion on consent by examining judicial approaches to determining the existence of consent in three selected areas--contracts, tort claims involving medical treatment, and criminal cases involving admissibility of confessions, from the late nineteenth century until the present. This article examines how courts have approached the basic factual question of finding consent and how judicial approaches in those areas have evolved over time. The review shows that the late 19th century saw courts adopting a similar approach for finding consent across the three areas. Courts focused on observable signs of consent, verbal or nonverbal communications, to determine existence of consent. They found consent unless circumstances suggested that the consenting party lacked the power to use their will. However, courts began to diverge in the early and mid-twentieth century in their approaches to ascertaining consent. In contract disputes, courts' consent approach has remained static, focusing on observable signs of consent or, in contract law parlance, "manifestations of assent." In tort cases involving medical treatment, courts began requiring more than observable signs of consent; instead, courts focused on the consenting party's access to information and comprehension, described by scholars as the informed consent doctrine. The judicial consent approach undertook the most dramatic change in criminal cases involving admissibility of confessions with judicial adoption of presumption of non-consent in custodial interrogation without the required warnings.

This article suggests that multiple factors appear to have contributed to divergent consent approaches across the three areas. Consent plays a different role in contract disputes from that in medical treatment and criminal confession cases. Courts have adopted a heightened consent inquiry in medical treatment and criminal confession cases as responses to significant social changes and increased public awareness of individual rights and the need to protect individuals from potential abuses and arbitrary government power. In addition, human cognitive biases—our flawed decision-making process, may have also contributed to the divergence.

[+] Chunlin Leonhard is the Leon Sarpy Distinguished Professor of Law at Loyola University New Orleans College of Law. I would like to thank Loyola University New Orleans College of Law and Leon Sarpy Professorship for their support of this research project. I am especially grateful to my research assistant Ms. Brooke Hathaway for her competent and timely research assistance. The opinions expressed herein are mine alone.

INTRODUCTION

Consent permeates many different areas of U.S. laws. It has been described as a concept with "moral magic" powers.[1] Consent has been used as justification

1. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121 (1996).

for imposing civil liability in contract law.[2] It has shielded people from tort liability when used, for example, as a defense in assault and battery cases.[3] Consent has also been used as the basis for using one's own words against oneself in criminal prosecutions.[4]

U.S. legal scholars have devoted a lot of attention to the role that consent has played in laws and judicial consent jurisprudence.[5] Some have criticized judicial approaches to ascertaining consent.[6] Some have been searching for solutions to the perceived problems.[7]

This essay contributes to the discussion on consent by examining judicial approaches to determining the existence of consent in three selected areas—contracts, tort claims involving medical treatment, and criminal cases involving admissibility of confessions, from the late nineteenth century until the present.[8]

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2. Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RSRV. L. REV. 57, 59 (2012) [hereinafter Leonhard, *Unbearable Lightness of Consent*] ("Consent has morally justified and legitimized government intervention in private contractual relationships.").

3. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005) ("[C]onsent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.").

4. *See, e.g.*, United States v. Magness, 69 F.3d 872, 873 (8th Cir. 1995).

5. Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140–42, 1155 (2019) (describing the courts' treatment of consent or assent as a "paradigm slip" and the modern contracts as "pseudo-contracts"); Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165 (2017); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 213 (2001) (arguing that "caselaw fails to consider the reality that most people will feel compelled to allow the police to search" and "the current doctrine of consent inherently fosters distrust of police officers as well as the judicial system"). Social and political scientists have also examined consent from social and political perspectives. *See, e.g.*, DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 1 (1989).

6. Strauss, *supra* note 5, at 221 (criticizing the Supreme Court's test for evaluating voluntariness in consent searches); *see* also Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (examining false confessions in forty cases).

7. The American Law Institute's current effort at drafting the Restatement of Consumer Contracts is one of the efforts to respond to criticism of the consent doctrine in contracts. *Restatement of the Law, Consumer Contracts*, AM. L. INST., https://www.ali.org/projects/show/consumer-contracts/#_status (last visited March 13, 2022). *See also* Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 375 (2020); Kar & Radin, *supra* note 5, at 1142–43 (proposing the shared meaning analysis "to bring contract law back into coherence with its core concepts, principles, and justifications"); Leonhard, *Unbearable Lightness of Consent*, *supra* note 2, at 85 (proposing the application of the totality of the circumstances standard to determine consent in contract disputes).

8. This article limits its examination to the three representative areas because of manageability issues. This article also does not intend to engage in a debate as to whether consent is sufficient to justify imposition of liability or to excuse certain actions. For a discussion related

This article examines how courts have approached the basic factual question of finding consent and how judicial approaches in those areas have evolved over time.[9]

The review shows that the late 19th century saw courts adopting a similar approach for finding consent across the three areas.[10] Courts focused on observable signs of consent, verbal or nonverbal communications, to determine existence of consent.[11] They found consent unless circumstances suggested that the consenting party lacked the power to use their will.[12]

However, courts began to diverge in the early and mid-twentieth century in their approaches to ascertaining consent. In contract disputes, courts' consent approach has remained static, focusing on observable signs of consent or, in contract law parlance, "manifestations of assent."[13] In tort cases involving medical treatment, courts began requiring more than observable signs of consent; instead, courts focused on the consenting party's access to information and comprehension, described by scholars as the informed consent doctrine.[14] The judicial consent approach undertook the most dramatic change in criminal cases involving admissibility of confessions with judicial adoption of presumption of non-consent in custodial interrogation without the required warnings.[15]

This essay begins with a discussion of types of verbal and non-verbal expressions of consent, drawing from social science studies on human communications. Part II examines judicial approaches to finding consent in the three selected areas. Part III offers some possible explanations for the divergent approaches.

This article suggests that multiple factors appear to have contributed to divergent consent approaches across the three areas. Consent plays a different

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to the scope of consent, see a series of articles written by Professor Vera Bergelson. Vera Bergelson, *The 2008 David J. Stoffer Lecture: Autonomy, Dignity, and Consent to Harm*, 60 RUTGERS L. REV. 723 (2008); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007).

9. This article continues my previous research related to the consent doctrine in contract law. *See* Leonhard, *Unbearable Lightness of Consent*, *supra* note 2 (questioning the contract law's reliance on consent as justification for use of government power in favor of one contractual party); Chunlin Leonhard, *Dangerous or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law*, 91 ST. JOHN'S L. REV. 385, 395–400 (2017) [hereinafter Leonhard, *Dangerous or Benign Legal Fictions*] (identifying consent in contract law as a dangerous legal fiction).

10. *See* discussion *infra* Section II.

11. *See* discussion *infra* Section II.

12. *See* discussion *infra* Section II.

13. See discussion *infra* Section II(A). Tole v. Hardy, 6 Cow. 333, 339 (N.Y. Sup. Ct. 1826) (finding "manifestation of assent"); Knutson v. Sirius XM Radio Inc., 771 F.3d 559, 561, 565 (9th Cir. 2014) (discussing whether failure to cancel a trial subscription constituted a manifestation of assent to an arbitration provision).

14. *See* discussion *infra* Section II (B).

15. Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* discussion *infra* Section II(C)(3).

role in contract disputes from that in medical treatment and criminal confession cases. Courts have adopted a heightened consent inquiry in medical treatment and criminal confession cases as responses to significant social changes and increased public awareness of individual rights and the need to protect individuals from potential abuses and arbitrary government power. In addition, human cognitive biases—our flawed decision-making process, may have also contributed to the divergent approaches.

I. THE SEARCH FOR CONSENT AND ITS CHALLENGE

Let us start with the most basic question: how does a court determine when someone has consented? Because consent is an internal mental status, the question is easy and difficult to answer. It is easy because as human beings we have learned how to communicate with each other through verbal and nonverbal means.[16] Courts can answer the question by examining observable verbal and nonverbal signs to determine if someone has consented.[17]

The question can be difficult at the same time, however, because consent is an internal state of mind.[18] Scientific studies have shown that observable signs sometimes may not be a true reflection of an inner mental status.[19] Unable to read people's minds, courts must rely on observable signs, verbal and non-verbal communications, to ascertain whether a person has consented.[20] These verbal and non-verbal communications are essentially reification of consent.

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16. Lisa Slattery Rashotte, *What Does That Smile Mean? The Meaning of Nonverbal Behaviors in Social Interaction*, 65 SOC. PSYCH. Q. 92, 99 (2002).

17. Heritage Roofing, LLC v. Fischer, 164 S.W.3d 128, 133 (Mo. Ct. App. 2005) (holding that party orally accepted terms of written proposal when he stated, "I approve it, I want you to go ahead and do the work"); Great Am. Fed. Sav. & Loan Ass'n v. Grivas, 484 N.E.2d 429, 434 (Ill. App. Ct. 1985) (denying reformation of lease where lessee signed lease and court found no mistake of fact, fraud, or misrepresentation despite the lessee's contention that he did not read the terms of the lease).

18. Hurd, *supra* note 1, at 124–25.

19. Alan M. White, *Behavior and Contract*, 27 L. & INEQ. 135, 150 (2009) ("People's preferences are highly contingent on situational factors, such as the framing of choices and the channels by which choices are offered, and are thus readily subject to seller manipulation.").

20. *Grivas*, 484 N.E.2d at 434 (denying reformation of lease where lessee signed lease and court found no mistake of fact, fraud, or misrepresentation despite the lessee's contention that he did not read the terms of the lease); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1165 (7th Cir. 1996) (holding defendant accepted terms of license after purchasing and keeping the product after having a chance to read the terms of the license).

A. Observable Signs of an Internal Mental Status

How do courts determine whether someone has consented when there is a dispute about it?[21] That task is made easier because of the human ability to think and communicate in using speech.[22] A unique feature of human language is its ability to transmit information about abstract concepts.[23] Human beings can thus communicate with each other through verbal as well as nonverbal means even though no one can observe internal mental processes.

When human beings communicate through words, either oral or written, it is referred to as verbal communication.[24] Verbal communication allows humans to express their internal mental processes with each other because human beings have learned to associate meaning with oral or written words.[25] For example, we have learned to associate the word "yes" to denote the abstract concept of consent or agreement.[26] It is also commonly understood that someone agrees to the terms of an agreement when the person signs on the signature line of a document.[27]

Humans can also communicate their internal mental processes through non-verbal means.[28] Nonverbal communication is defined as "a process of generating meaning using behavior other than words."[29] Nonverbal communication includes vocal elements, which is referred to as paralanguage and includes pitch, volume, and rate.[30] Nonverbal communications also include non-vocal elements such as body language, gestures such as raising hands, shaking another person's hand, pushing a button, facial expressions, and eye

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21. Courts have generally treated the existence of consent as a question of fact. Highland Cap. Mgmt., L.P. v. Bank of Am., 698 F.3d 202, 206 (5th Cir. 2012) ("With respect to oral contracts, whether a contracting party intends to be bound is a question of fact for the factfinder to resolve."); United States v. Janis, 387 F.3d 682, 686 (8th Cir. 2004) ("Voluntariness of consent is a question of fact determined by viewing the totality of relevant circumstances.").

22. YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 21 (2015).

23. *Id.* at 24.

24. DAVID CRYSTAL, HOW LANGUAGE WORKS: HOW BABIES BABBLE, WORDS CHANGE MEANING, AND LANGUAGES LIVE OR DIE (2005).

25. COMMUNICATION IN THE REAL WORLD: AN INTRODUCTION TO COMMUNICATION STUDIES 2 (Univ. of Minn. Librs. Publ'g 2d. ed. 2016) [hereinafter COMMUNICATION IN THE REAL WORLD].

26. Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 19 (2010) ("We often speak of consent in binary terms, boiling it down to 'yes' or 'no.' That reflects one of the most fundamental features of social life, a phenomenon so widely observed as almost to escape mention: we generally smile on consensual transactions but frown on unconsensual ones.").

27. Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 637 ("Consent can be oral, such as a stated agreement, or behavioral, such as the click of a mouse or signature of a document.").

28. COMMUNICATION IN THE REAL WORLD, *supra* note 25, at 164.

29. *Id.*

30. *Id.* at 165.

contact, among others.[31] For example, in most cultures, one can indicate consent by nodding one's head or by making certain hand gestures. At times, one can also infer consent from another's silence, action or inaction depending on the circumstances.[32]

Verbal and nonverbal communications work as part of a larger language system, but they have notable differences.[33] First, verbal communication and nonverbal communication are processed by different hemispheres of the brain.[34] Next, nonverbal communication "conveys more emotional and affective meaning" and "typically conveys more meaning than verbal communication."[35] Nonverbal communication is more involuntary and more ambiguous than verbal communication.[36] Finally, nonverbal communication can be more credible than verbal communication.[37]

When there is a dispute about the existence of consent, courts have to rely on evidence to resolve the dispute because of their inability to read the parties' minds. Evidence of verbal and nonverbal communications, observable signs of a person's mental processes, thus allows courts to determine whether a party consented.[38]

B. The Challenge to the Courts

Reliance on observable signs of consent raises multiple questions. One problem is that the observable signs may not reflect the mental status accurately.[39] In other words, we may not say what we mean. Another problem is that even when observable signs (such as signing a contract) accurately reflect mental status, the mental status itself may be manipulated by some external factor.[40] In other words, we may say what we mean, but we may not know what we are saying.[41] These possible discrepancies between observable signs of consent and mental status have created the challenge with which courts have had to wrestle.

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31. *Id.*

32. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 3 (1995) ("[M]ost of us would acknowledge that silence can at times be fraught with meaning. Indeed, there are a surprising number of legal contexts where a person's failure to act may be quite significant.").

33. COMMUNICATION IN THE REAL WORLD, *supra* note 25, at 174.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Grivas*, 484 N.E.2d at 434 (denying reformation of lease where lessee signed lease and court found no mistake of fact, fraud, or misrepresentation despite the lessee's contention that he did not read the terms of the lease); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

39. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8–10 (2011).

40. *Id.*; *see also* Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621 (2011); White, *supra* note 19 at 150.

41. White, *supra* note 19 at 149–50.

Psychological and behavioral research over the last four decades has shed more light on how human beings think.[42] These studies show that humans suffer from predictable cognitive biases which consistently lead to decisional errors.[43] The predictability of our human biases also makes human beings easy target of manipulation.[44] This means that human will itself can be manipulated.[45]

Scientific findings show that determining when someone has consented is not easy.[46] If human will itself is manipulated, courts are faced with some difficult questions. Should the court only concern itself with observable signs of consent? Or should the law concern itself with honoring human will? The challenge courts are facing is this discrepancy between observable signs of consent and the internal state of human will free of outside influence.

C. Individual Autonomy and its Role in Judicial Consent Jurisprudence

The desire to honor a person's consent is rooted in our belief in individual autonomy and freedom.[47] Consent understandably serves as justification for imposing or avoiding legal liability or waiving certain rights.[48] The question is what type of consent actually optimizes and protects individual autonomy.

Legal scholars generally agree that, in order for consent to reflect individual autonomy which the law is trying to promote, certain conditions have to be met.[49] Autonomy-promoting consent exists where a person's consent is voluntary (voluntariness) and the person has access to necessary information, and the ability to comprehend that information.[50] Therefore, in order to truly

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42. Kahneman, *supra* note 39.

43. *Id.* at 10; White, *supra* note 19 at 149–50.

44. Dan Ariely, PREDICTABLY IRRATIONAL, REVISED AND EXPANDED EDITION: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 321 (2009).

45. *Id.*

46. *Id.*

47. RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 7–8 (1986); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 384 (1985).

48. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (enforcing shrink wrap license); Leonhard, *Unbearable Lightness of Consent*, *supra* note 2, at 59 ("Consent has morally justified and legitimized government intervention in private contractual relationships."); Strauss, *supra* note 5, at 257 ("Consent is a personal waiver of Fourth Amendment rights, a personal relinquishment of rights of privacy.").

49. Scholars have formulated the conditions for a valid consent slightly differently. Professor Nancy S. Kim described the different formulations of the conditions in her article. *See* Kim, *supra* note 5, at 169–173 (describing the conditions promoting autonomy as intentionality, understanding, and voluntariness and focusing her analyses on her own formulation of conditions as an intentional act, knowledge, and voluntariness).

50. *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, NAT'L COMM'N FOR THE PROT. OF HUM. SUBJECTS OF BIOMEDICAL AND

honor individual autonomy, courts should only hold the consenting party accountable where their consent is a result of voluntariness, information, and comprehension.[51] Scholars have labeled this type of consent as "informed consent."[52]

Observable signs of consent may evidence voluntariness by means of an act either through verbal or nonverbal communication. They are, however, no proof that the voluntary act means consent based on access to information and comprehension. For ease of reference, this article uses the term, simple consent, to denote consent based merely on observable signs of consent whether verbal or non-verbal but without evaluation of the information or comprehension elements,[53] to differentiate it from the informed consent approach which considers all three elements.

II. CONSENT IN CONTRACT, MEDICAL TREATMENT, AND CRIMINAL CONFESSION CASES

A review of selected cases shows that the judicial consent approaches across the three areas started from a similar position in the late nineteenth century. Courts' search for consent focused on observable signs of consent and recognized the importance of voluntariness through defenses such as duress, undue influence, or coercion.[54] In other words, all courts began with the simple consent approach.

In contract disputes, courts' consent approach has stayed constant throughout the examined period and retains the simple consent approach to this day. In medical treatment cases however, courts have over time evolved from the simple consent approach to a search for informed consent. In criminal confession cases, the courts' approach to consent also changed dramatically over time with the adoption of a presumption of non-consent in custodial interrogations.

A. Consent in Contract Law

Consent plays a prominent role in contract law because consent of the parties remains the justification for courts to exercise state power to enforce private

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BEHAV. RSCH. (1979), https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf (last visited Feb. 14, 2021) [hereinafter *Belmont Report*].

51. Kim, *supra* note 5, at 169–70.

52. *Belmont Report*, *supra* note 50; Kim, *supra* note 5, at 171.

53. This term was used by Dr. Simon N. Whitney et al., in their article, *A Typology of Shared Decision Making, Informed Consent, and Simple Consent*, 140 ANNALS INTERNAL MED. 54, 55 (2004) (where simple consent occurs by verbal or non-verbal communication such as "accepting and filling a prescription or by choosing fish instead of steak when advised to eat a more heart-healthy diet.").

54. *See* Sparf v. United States, 156 U.S. 51, 55 (1895); Wilson v. United States, 162 U. S. 613, 623 (1896); Brown v. Mississippi, 297 U.S. 278, 286 (1936).

agreements.[55] If a party has consented to the terms of the agreement, then the consent creates obligation on the part of the consenter.[56] The search for evidence of consent is thus the courts' primary focus when parties dispute that they have consented.

In their search for consent in contract disputes, courts have focused on observable signs of consent, both verbal and nonverbal, since the late nineteenth century. Courts have referred to these observable signs as "manifestations of assent."[57] Courts' approach remains the same today despite the tremendous technological changes in business practices our society has experienced over the last few decades with the ascent of the internet and e-commerce. [58]

1. Verbal Signs of Consent

Courts have generally accepted a party's signature (verbal communication) as evidence of consent absent situations which would trigger contract law defenses since the late 19th century.[59] One's signature is an observable sign of consent.[60] Indeed, courts treat written contracts as the highest evidence of the terms of an agreement and impose a duty on every contracting party to learn and know its contents before signing.[61] Courts even enforce a contract against a party where the party signed the agreement even if they did not read it.[62]

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55. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 493 (1993).

56. Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 171 (1917).

57. *Tole*, 6 Cow. at 339; *Knutson*, 771 F.3d at 561, 565 (discussing whether failure to cancel a trial subscription constituted a manifestation of assent to an arbitration provision).

58. Kar & Radin, *supra* note 5, at 1140–42 (describing the changes that technology has brought about to our society while contract law has remained the same resulting in lack of coherence between the meaning and function of the core contract law concepts such as consent).

59. Coolidge v. Puaaiki, 3 Haw. 810, 814 (1877); *Grivas*, 484 N.E.2d at 434 (denying reformation of lease where lessee signed lease and court found no mistake of fact, fraud, or misrepresentation despite the lessee's contention that he did not read the terms of the lease).

60. *Coolidge*, 3 Haw. at 813 ("The laborers signed the contract intelligently and there is no allegation made that either of the parties here have been sent to any place or subjected to any exposure which was not reasonably contemplated by themselves when they signed the contract.").

61. Vargas v. Esquire. Inc., 166 F.2d 651, 654 (7th Cir. 1948) ("It is a rule universally recognized that a written contract is the highest evidence of the terms of an agreement, and it is the duty of every contracting party to learn and know its contents before he signs it.").

62. Oelze v. Score Sports Venture, LLC, 927 N.E.2d 137, 144 (Ill. App. Ct. 2010); Montgomery v. Fidelity & Guar. Life Ins. Co., 713 N.W.2d 801, 803 (Mich. Ct. App. 2005) ("It is well established that failure to read an agreement is not a valid defense to enforcement of a contract."); Huber v. Hovey, 501 N.W.2d 53, 55 (Iowa 1993) (rejecting appellee's argument that release was invalid because he did not read it) ("It is well settled that failure to read a contract before signing it will not invalidate the contract."); Computer Network, Ltd. v. Purcell Tire & Rubber Co., 747 S.W.2d 669, 675 (Mo. Ct. App. 1988).

Courts have also found consent where consent was communicated orally, another observable sign of consent. Courts have often enforced an oral contract unless writing is specifically required by statutes of fraud. [63]

With the advent of e-commerce in recent decades, courts have found consent based on the digital versions of verbal communication of consent—clicking "I accept" or "I agree," also known as clickwrap agreements.[64] Many businesses have established an online presence and use standard form agreements with boilerplate clauses. Website users are sometimes required to click an "I agree" box after being presented with a list of terms and conditions of use or with a link to those terms.[65]

For example, in *Holl v. United Parcel Service*, the District Court for the Northern District of California enforced an arbitration clause against the plaintiff where the plaintiff checked a box when signing up for the defendant's program.[66] The text next to the box read, "[b]y selecting this checkbox and the Continue button, I agree to the UPS Technology Agreement and the UPS My Choice® Service Terms."[67] The actual terms were hyperlinked next to the checkbox. The court found that the plaintiff was provided with an opportunity to review the terms of service and was put on "inquiry notice" of the terms.[68] The court rejected plaintiff's argument that the plaintiff did not meaningfully consent to the terms.[69] Apparently, the plaintiff's act of clicking the box is sufficient as evidence of consent.

2. Nonverbal Signs of Consent

U.S. courts have also found consent to contract terms based on nonverbal signs. For example, courts have found that the consent is satisfied where one party noticed the contract terms and did not return the product.[70] In these cases,

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63. *Heritage Roofing, LLC*, 164 S.W.3d at 135 (holding that party orally accepted terms of written proposal when he stated "I approve it, I want you to go ahead and do the work."); Tymon v. Linoki, 213 N.E.2d 661, 663 (N.Y. 1965) (holding enforceable contract of sale was made when plaintiff orally accepted written offer).

64. I. Lan Sys., Inc. v. Netscout Serv. Level Corp., 183 F.Supp.2d 328, 338 (D. Mass 2002); Ranazzi v. Amazon.com, Inc., 46 N.E.3d 213, 218 (Ohio Ct. App. 2015); Collins P. Marks, *There Oughta Be a Law: What Corporate Social Responsibility Can Teach Us About Consumer Contract Formation*, 32 LOY. CONSUMER L. REV. 498, 499 (2020).

65. Marks, *supra* note 64, at 499.

66. Holl v. United Parcel Service, No. 16-cv-05856, 2017 U.S. Dist. LEXIS 153317, at *5 (N.D. Cal. Sept. 18, 2017).

67. *Id.* at *3.

68. *Id.* at *14.

69. *Id.* at *12–13.

70. Lewis v. Meginniss, 12 So.19, 21 (Fla. 1892) (describing the "well-recognized principle of law that, where one person performs services for another at his request, or where services are rendered by one person for another without his expressed request, but with his knowledge and under

courts assume the nonverbal act—noticing the product and failing to return the product, constitutes evidence of consent.

In *Carnival Cruise Lines v. Shute*, the United States Supreme Court enforced a forum selection clause included among three pages of terms attached to a boarding ticket for a cruise ship vacation.[71] The Supreme Court enforced the forum selection clause because the buyers had notice of the terms and considered the plaintiff's conduct of going on the cruise, a non-verbal communication, as evidence of consent.[72]

Following the *Carnival Cruise Lines* case, courts began enforcing agreements against a consenting party where the party communicated consent non-verbally, for example, by keeping a product.[73] In those cases, buyers typically purchased a product without seeing the contract terms.[74] Courts enforced the contract term against the buyer because the buyer kept the products after they had notice of the terms.[75] The act of keeping the product is treated as evidence of consent.

For example, in *Hill v. Gateway 2000, Inc*., plaintiff buyers who had purchased computers through a telephone order sued the manufacturer under the Civil Racketeer Influenced and Corrupt Organizations Act among others.[76] The manufacturer tried to enforce the arbitration clause included in terms sent to buyers together with the computers.[77] The lower court refused to enforce the agreement and the manufacturer appealed.[78] Judge Easterbrook found that the terms sent in box, which stated that they governed sale unless computer was returned within 30 days, were binding on the plaintiffs.[79] Judge Easterbrook apparently treated the act of keeping the computers as non-verbal communication of consent.[80]

In some cases, courts found apparent consent where business websites state that website visitors agree to the terms by browsing the site's content as long as

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circumstances which give rise to the presumption of a promise to pay for them, reasonable compensation may be recovered"); *Hill*, 105 F.3d at 1150; ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996); Adobe Sys., Inc. v. Stargate Software Inc., 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002).

71. Carnival Cruise Lines v. Shute, 499 U.S. 585, 587, 595 (1991).

72. *Id.* at 593–97.

73. *ProCD, Inc.*, 86 F.3d at 1452–53; Rinaldi v. Iomega Corp., No. 98C-09-064, 1999 Del. Super. LEXIS 563 at *1, 19 (Super. Ct. Sept. 3, 1999).

74. *Hill*, 105 F.3d at 1150.

75. *Id.*

76. *Id. at 1148.*

77. *Id.*

78. *Id.*

79. *Id.* at 1148–49.

80. *Id. at 1149*; *see also ProCD, Inc.*, 86 F.3d at 1452–53.

there was some evidence that the consenting party was aware of the terms.[81] In *Pollstar v. Gigmania, Ltd.*, plaintiff Pollstar allowed internet users, subject to a license agreement, to download concert information published on Pollstar's website.[82] Pollstar alleged defendant Gigmania breached the license agreement by copying information from Pollstar's website and using it on Gigmania's website for commercial purposes.[83] On a defense motion to dismiss, Gigmania argued that there was a lack of mutual consent to the license agreement because the web page containing the agreement was only linked to the homepage, and while the homepage contained a notice stating "use is subject to license agreement," it appeared in gray print with a gray background.[84] While acknowledging that website users might be unaware of the agreement, the court refused to declare the invalidity and unenforceability of the license agreement.[85] The court noted that it was possible for people to "enter into a contract by using a service without first seeing the terms."[86]

In conclusion, in adjudicating contract disputes, courts seem to be satisfied that consent exists where a person acted voluntarily, for example, by signing or clicking a button or keeping a product without any objections. Courts' search for consent does not go beyond observable signs of consent.[87]

B. Consent in Medical Treatment Cases[88]

In medical treatment cases, consent becomes an issue when a defendant raises it as a defense against a plaintiff's attempt to seek recovery for injury caused by a treatment. The consent issue can arise in multiple scenarios. One scenario is that the defendant did not obtain any consent at all.[89] Another is that the defendant obtained consent for one treatment but provided a different

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81. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401 (2d Cir. 2004) (enforcing a browsewrap agreement based on defendant's admission that he was aware of the terms); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002) (refusing to enforce a browsewrap contract because of lack of mutual assent).

82. Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974, 976 (E.D. Cal. 2000).

83. *Id.* at 976–77.

84. *Id.* at 980–81.

85. *Id.* at 981–82.

86. *Id.* at 982.

87. Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991); *ProCD, Inc.*, 86 F.3d at 1452–53.

88. To keep this article's examination more manageable, this article focuses only on judicial approaches to consent in medical treatment cases. Consent is a shield against imposition of liability in many different types of tort claims. RESTATEMENT (SECOND) OF TORTS § 892A cmt. a (AM. LAW INST. 1979) ("[N]o one suffers a legal wrong as the result of an act to which, unaffected by fraud, mistake or duress, he freely consents or to which he manifests apparent consent.").

89. Shulman v. Lerner, 141 N.W.2d 348, 348–49 (Mich. Ct. App. 1966).

treatment.[90] The third scenario is where the defendant obtained consent for and provided the treatment, but the plaintiffs argue that they would not have given consent had the doctor advised them of all the risks.[91] In all three situations, courts have to determine if the plaintiffs in fact consented to the treatment.

Courts in the late nineteenth century treated the act of seeking a physician's treatment as a form of non-verbal consent.[92] Eventually, courts rejected the implicit consent approach and began to focus on the quality of consent.[93] Today, all states have adopted the informed consent standard in medical treatment cases.[94]

1. Voluntary Act of Seeking Medical Treatment as Consent

Courts began wrestling with the consent issue involving medical treatments in the late nineteenth century.[95] When a plaintiff raised lack of consent as the basis for recovery, courts treated the plaintiff patient's seeking medical treatment as "consent" for a doctor to perform an operation and the only basis for recovery in that situation would be under a negligence theory.[96]

For example, in the 1898 *Sullivan v. McGraw* case, the plaintiff sued a doctor to recover damages for the wrongful operation upon the plaintiff's left leg when the defendant was employed to operate upon the right leg.[97] The plaintiff alleged that the "defendant wrongfully and carelessly operated upon the left leg, thereby causing plaintiff great pain and suffering."[98] The plaintiff argued that he did not consent to the operation on the left leg.[99] The lower court rejected the consent argument and treated the case as resting on a negligence theory.[100] The lower court noted that the plaintiff had gone to the doctor for the purpose of having an operation, suggesting that the plaintiff's visit at the doctor was deemed as consent implied from the plaintiff's conduct.[101] The lower court then directed a verdict for the defendant because of lack of evidence of any negligence. On appeal, the Michigan Supreme Court affirmed the lower court's statement on the

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90. Mohr v. Williams, 104 N.W. 12, 13 (Minn. 1905); In re Estate of Johnson, 16 N.W.2d 504, 507 (Neb. 1944).

91. Rodriguez v. N.Y.C. Health & Hosps. Corp., 858 N.Y.S.2d 99, 101 (N.Y. App. Div. 2008).

92. Sullivan v. McGraw, 76 N.W. 149, 150–51 (Mich. 1898).

93. Salgo v. Leland Stanford Jr. Univ. Bd. of Trs., 317 P.2d 170, 181 (Cal. Ct. App. 1957).

94. Anthony Szczygiel, *Beyond Informed Consent*, 21 OHIO N.U. L. REV. 171, 172 (1994).

95. FADEN & BEAUCHAMP, *supra* note 47, at 7–8.

96. *Sullivan*, 76 N.W. at 150–51.

97. *Id.* at 149.

98. *Id.*

99. *Id.* at 150.

100. *Id.* at 150–51.

101. *Id.*

consent issue.[102] The courts accepted the plaintiff's voluntary act of seeking medical treatment as evidence of consent.

2. Requirement of Verbal Communication of Consent

A few years later, an Illinois court rejected the idea of a broad implicit consent simply by seeking treatment.[103] In *Pratt v. Davis*, Mrs. Pratt sued a physician for battery because he performed a hysterectomy on her without first obtaining her consent. The plaintiff did not allege the operation was unskillfully performed.[104] The physician had obtained her consent for an earlier operation, but admitted he had not even attempted to get consent for the second procedure.[105] The physician acknowledged he had intentionally misled the plaintiff and had taken chances of which she had been completely unaware.[106] The doctor claimed that because Mrs. Pratt was an epileptic, she was incompetent to give consent or to deliberate intelligently about her situation.[107] The court held the physician liable for operating without consent.[108] The Illinois Supreme Court subsequently affirmed the appellate court's reasoning.[109]

While acknowledging the broad rule regarding the implied consent, the appellate court rejected the defense argument that the plaintiff's voluntary act of seeking treatment gave the consent for him to do whatever he might have deemed necessary.[110] The court limited the implied consent to specific procedures and not to seeking medical treatment in general.[111] The court held that the surgeon had to obtain express consent from the patient before the surgeon could engage in a serious, major operation.[112]

Eight years later, the Supreme Court of Oklahoma extended the reasoning in the *Pratt* case to narrowly interpret the scope of a patient's consent.[113] In *Rolater v. Strain*, a woman sued her physician after he removed a sesamoid bone from her foot during an operation.[114] The plaintiff had consented to the operation to drain an infection, but had instructed the doctor not to remove any bones from

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102. *Id.* at 151.
103. Pratt v. Davis, 118 Ill. App. 161 (Ill. App. Ct. 1905), *aff'd*, 79 N.E. 562 (Ill. 1906).
104. *Id.* at 180.
105. *Id.* at 170.
106. *Id.*
107. *Id.*
108. *Id.* at 183–84.
109. *Pratt*, 79 N.E. at 565.
110. *Pratt*, 118 Ill. App. at 166.
111. *Id.*
112. *Id.* at 166–67; *see also Mohr*, 104 N.W. at 14–15 (adopting the reasoning of the *Pratt* court and holding that the surgeon should have consulted with the patient and obtained her consent before performing any surgery).
113. Rolater v. Strain, 137 P. 96, 98 (Okla. 1913).
114. *Id.* at 96.

her foot.[115] The defendant argued that *Mohr v. Williams* did not apply because he obtained the patient's consent to operate on the foot and he operated on the correct foot.[116] The court rejected the argument and held that the principles of the earlier cases applied to the facts.[117] The court noted that the doctor did not operate on the foot in the exact manner that the patient had consented to.[118]

With those cases, courts moved away from the earlier implicit consent rule based on nonverbal communication—the seeking of medical treatment. Courts required doctors to obtain the patient's explicit consent before they could operate on a patient, except for certain life-threatening emergencies.[119]

3. The Informed Consent Doctrine in Medical Treatment Cases

Courts in early twentieth century cases discussed the consent issue related to lack of consent and scope of consent, i.e., whether a doctor needed to obtain consent at all and the scope of the consent. They did not focus on the quality of the consent until a few decades later.[120]

In 1957, a California court first addressed quality of consent in *Salgo v. Leland Standford Jr. University Board of Trustees*.[121] Mr. Salgo brought a malpractice suit against his physicians alleging negligence when he became permanently paralyzed after having undergone an aortography.[122] Mr. Salgo's doctor had recommended the surgery and the patient consented to the procedure.[123] Mr. Salgo argued that the doctor never explained the various possible complications of the suggested procedures or warned him about the risk of potential paralysis.[124] The court stated that "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."[125] The court specified that the information needed to make an intelligent decision included the harms, benefits, risks and alternatives of the proposed procedure.[126] The court left it to the doctor's discretion to decide how much information to disclose to the patient.[127] The *Salgo* court thus imposed a

115. *Id.* at 97.
116. *Id.* at 98.
117. *Id.*
118. *Id.*
119. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (relying on *Pratt* and *Mohr* for support).
120. *Salgo*, 317 P.2d at 181.
121. *Id.*
122. *Id.* at 172–75.
123. *Id.* at 173.
124. *Id.* at 181.
125. *Id.*
126. *Id.*
127. *Id.*

duty on the doctor to disclose the facts necessary to form the basis of an "intelligent consent."[128]

Subsequent to *Salgo*, the Supreme Court of Kansas recognized the duty to disclose rule in a negligence claim.[129] In *Natanson v. Kline*, the plaintiff suffered from breast cancer and had a mastectomy.[130] She then endured cobalt therapy to the mastectomy site to reduce the chance that the cancer would spread.[131] After she was injured from the cobalt radiation therapy, she sued her radiologist for negligence both in the performance of the procedure and in failing to warn her about the nature and hazards of the treatment.[132] The court outlined the duty of disclosure as "the obligation of a physician to disclose and explain to the patient in language as simple as necessary, the nature of the ailment, the nature of the proposed treatment, the probability of success or of alternatives, and perhaps the risks of unfortunate results and unforeseen conditions within the body."[133]

By imposing a duty to disclose on the defendant, courts refuse to accept verbal and nonverbal communication of consent alone as evidence of consent.[134] Instead, plaintiffs have to give consent while having access to the necessary information and comprehension, i.e., plaintiffs' consent has to be informed.

The informed consent doctrine has now been firmly established in medical treatment cases.[135] All U.S. jurisdictions have adopted it.[136] States began codifying the informed consent doctrine between 1957 and 1988.[137] All states have now enacted statutes mandating informed consent before a physician can provide any medical treatment.[138]

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128. *Id.*

129. Natanson v. Kline, 350 P.2d 1093 (Kan. 1960).

130. *Id.* at 1095.

131. *Id.* at 1096.

132. *Id.* at 1098–99.

133. *Id.* at 1106. It is beyond the scope of this paper to examine the exact contours of the duty to disclose. The scope of the duty to disclose and the precise standard to measure if the duty to disclose has been complied with is a subject of intense scholarly discussion. *See generally* David M. Studdert et al., *Geographic Variation in Informed Consent Law: Two Standards for Disclosure of Treatment Risks*, 4 J. EMPIRICAL LEGAL STUD. 103 (2007); Marc D. Ginsberg, *Informed Consent: No Longer Just What the Doctor Ordered?*, 15 MICH. ST. U.J. MED. & L. 17 (2010).

134. Jay Katz, *Informed Consent—Must It Remain a Fairy Tale?*, 10 J. CONTEMP. HEALTH L. & POL'Y 69, 72 (1993) (noting that "the doctrine of informed consent, if taken seriously, constitutes a revolutionary break with customary practice").

135. Szczygiel, *supra* note 94, at 172.

136. *Id.*

137. *Id.* at 189–90.

138. For interesting discussions about the codification efforts, *see* Kandy G. Webb, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 631, 675 (1976).

C. Consent in Criminal Cases Involving Admissibility of Confessions

Consent also features prominently in criminal cases as the basis to determine when defendants' own words can be used against them.[139] The U.S. Constitution prohibits the government from compelling individuals in a criminal case to be witnesses against themselves.[140] Defendants may waive the right based on consent.[141] The observable sign of consent in this context is a defendant's making of oral statements or signing a written statement.[142] Consent justifies the use of defendants' incriminating statements against them despite the constitutional prohibition.[143]

The late 19th century saw courts treating the act of making a confession as consent unless the circumstances suggested the act was not voluntary.[144] The U.S. Supreme Court then elevated the consent issue as a matter of constitutional due process and eventually adopted the totality of the circumstances standard to ascertain the existence of consent.[145] The Court focused its inquiry on the accused's access to information, whether the information was comprehended, and whether the act of consenting was voluntary.[146] The courts use this totality of the circumstances standard essentially to ascertain if the defendant's waiver was based on informed consent.[147]

However, the Court did not stop with the totality of the circumstances standard. In 1966, with *Miranda v. Arizona*, the Court took a dramatic turn and rejected a finding of consent based on verbal and non-verbal communication in the making or signing of a confession when the accused was in a custodial interrogation.[148] The Court essentially adopted a presumption of non-consent in a custodial interrogation unless the necessary information has been provided.[149]

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139. Hopt v. Utah, 110 U.S. 574, 579 (1884); Bram v. United States, 168 U.S. 532, 541–42 (1897); Haynes v. Washington, 373 U.S. 503, 514 (1963).

140. U.S. CONST. amend. V.

141. Miranda v. Arizona, 384 U.S. 436, 478 (1966); United States v. Santos, 131 F.3d 16, 19 (1st Cir. 1997) (finding confessions voluntary after defendant alleged they were involuntary due to his "mental disease" and the conduct of Secret Service agents who interviewed him).

142. *Santos*, 131 F.3d at 19.

143. Some scholars may question whether the confession cases are really decided on the basis of free will or choice. Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 164–65 (2007). That debate is beyond the scope of this article. It is also beyond the scope of this article to examine whether consent should justify a finding of waiver of a constitutional right.

144. *Hopt*, 110 U.S. at 585.

145. *Haynes*, 373 U.S. at 514.

146. *Id.* at 513–14.

147. *Id.*

148. *Miranda*, 384 U.S. at 457–58, 467–68.

149. *Id.* at 467–69, 475–76.

1. The Common Law Presumption of Consent

In assessing whether the accused confessed voluntarily, the late nineteenth century courts focused on observable signs of consent—the making or the signing of the confession by itself—as evidence of consent unless the circumstances showed that the accused did not do so voluntarily.[150] The courts presumed that an innocent person would not imperil their safety or prejudice their interests by an untrue statement.[151] Based on that presumption, courts found a confession voluntary in the absence of inducements, promises, and threats.[152]

For example, courts found confessions voluntary if the defendant made the statements voluntarily and the statements were not obtained by putting the prisoner in fear or by promises.[153] The fact that the defendant was in custody and in irons did not destroy the competency of a confession.[154] Imprisonment was not, in itself, sufficient to justify the exclusion of a confession.[155]

In *Hopt v. Utah*, the Court found that the defendant consented when he made the confession voluntarily without requiring additional evidence of non-coercion.[156] The witness, a detective, arrested the defendant at a railroad depot.[157] The detective then sent the defendant to jail with a policeman while he remained behind.[158] A few minutes later, the detective rejoined the defendant and the policeman.[159] The accused confessed to the detective at that time.[160] During the trial, the detective testified that the defendant made the confession voluntarily, "uninfluenced by hopes of reward or fear of punishment."[161] On appeal, the defendant argued that the court should have excluded the confession

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150. Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 320, 328–29 (1998) ("Given the myriad ways in which early modern Anglo-American criminal procedure compelled incriminating testimony from the accused, it is not surprising that confessions were considered admissible no matter how they were obtained.").

151. *Hopt*, 110 U.S. at 585.

152. *Id.*; Pierce v. United States, 160 U.S. 355, 357 (1896).

153. *Sparf*, 156 U.S. 51, 55 (1895); Wilson v. United States, 162 U. S. 613, 622 (1896) ("But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority touching the charge preferred, or because of a threat or promise, by or in the presence of such person, which, operating upon the fears or hopes of the accused in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.").

154. *Sparf*, 156 U.S. at 55.

155. *Id.*; *see also Wilson*, 162 U. S. at 623.

156. *Hopt*, 110 U.S. at 585.

157. *Id.* at 584.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

and required that the prosecution prove that the policeman did not do anything with the defendant outside of the detective's presence to unduly influence the confession.[162] The U.S. Supreme Court rejected the defendant's argument.[163]

2. The Adoption of the Totality of the Circumstances Standard

Over the next three decades, judicial decisions show that the courts became more aware of the effect of psychologically coercive pressures and inducements on the mind and will of an accused.[164] The consent question took on constitutional dimension in 1936 when the Court held that admission of a coerced confession would deny the accused due process under the Fourteenth Amendment.[165] The Court found that coerced confessions and resulting convictions would be "revolting to the sense of justice" and "a clear denial of due process."[166]

In 1963, the Court adopted the totality of the circumstances standard in *Haynes v. Washington* to determine whether a defendant's confession was voluntary.[167] Under that test, courts would examine almost every factor involved in the case. For example, courts would consider the intelligence, physical health, and emotional characteristics of the particular suspect, their age, education and prior criminal record, how often they were fed, whether they were deprived of sleep, how long the police questioning lasted, whether relatives or friends had been turned away, and whether their request for a lawyer had been denied.[168] Even though the Court did not frame the issue in those terms, it focused its analyses on the presence or lack of voluntariness and access to information and comprehension, all elements of an informed consent.[169]

In *Haynes*, the defendant argued his confession was involuntary and inadmissible, because it was induced by police threats and promises.[170] The defendant "testified at trial that during the approximately 16-hour period between the time of his arrest and the making and signing of the written

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162. *Id.* at 585.

163. *Id.* at 587.

164. *See* Penney, *supra* note 150, at 329.

165. Brown v. Mississippi, 297 U.S. 278, 287 (1936). Gerard E. Lynch, *Why Not a* Miranda *for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 236 n.4 (2007) ("The era of the Court's involvement with these issues is conventionally understood to have begun with the *Brown v. Mississippi*, 297 U.S. 278 (1936).").

166. *Brown*, 297 U.S. at 286.

167. *Haynes*, 373 U.S. at 514.

168. Dassey v. Dittman, 877 F.3d 297, 301 (7th Cir. 2017) ("Whether [petitioner's] confession was voluntary or not is measured against a general standard that takes into account the totality of the circumstances."); Fare v. Michael C., 442 U.S. 707, 725 (1979) ("This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."); Kamisar, *supra* note 143, at 164–65.

169. *Haynes*, 373 U.S. at 513–15.

170. *Id.* at 504.

confession," he asked police to allow him to call an attorney and to call his wife several times.[171] The police refused his requests and repeatedly told him "he would not be allowed to call unless and until he 'cooperated' with police and gave them a written and signed confession admitting participation in the robbery."[172]

The police denied him contact with the outside even after he signed a confession and after a preliminary hearing.[173] The police held the petitioner incommunicado for about a week after his arrest.[174] The defendant did not claim that the police physically abused him, denied him food or sleep, or questioned him for extended periods of time.[175]

The *Haynes* Court emphasized that the question whether the police obtained the petitioner's confession "by coercion or improper inducement" (that is whether the confession was voluntary) depended on an examination of the surrounding circumstances.[176] The Court, in a five-to-four decision, held the confession inadmissible.[177] With the totality of the circumstances standard, courts focused on the quality of consent rather than merely considering observable signs of consent, such as the acts of making or signing a confession.[178]

3. Miranda's Presumption of Non-Consent in a Custodial Interrogation

Three years after the *Haynes* decision, the Court's consent approach took a dramatic turn with *Miranda v. Arizona*.[179] The Court found that the statement obtained from an accused without providing the accused with the necessary

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171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 504 n.1.

176. *Id.* at 513.

177. *Id.* at 514.

178. *Id.* ("Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment.").

179. Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* decision has generated extensive scholarly discussions from all different perspectives. *See generally* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1060 (1998) (concluding "that Miranda has in fact handcuffed the cops and that society should begin to explore other, less costly ways of regulating police interrogation"); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 21 (1986) ("Thus, *Miranda*'s symbolic value not only has produced a better atmosphere for people who come in contact with the police but also may have made a tangible contribution toward curbing abusive police practices."). This article focuses only on the *Miranda* case for its significance on the consent issue.

warnings was not admissible as part of the government's case in chief.[180] While the totality of circumstances test remains the standard in non-custodial cases,[181] the *Miranda* approach is a drastic departure from the prior consent approach, because it disregards all observable signs of consent when a defendant is in police custody where the police failed to provide the *Miranda* warning.[182] In other words, the accused's observable sign of consent—the making or signing of a confession—was presumed to be invalid where the police failed to warn the accused of the consequences of their statements.[183]

In *Miranda*, police obtained statements from several defendants questioned while in custody or while their freedom was restrained in significant ways.[184] All of the defendants were interrogated in isolation.[185] No defendant was warned of their rights before their interrogations.[186] The police obtained oral admissions and statements signed by three of the defendants throughout those interrogations.[187] Noting those statements were obtained during incommunicado interrogation in a police-dominated atmosphere without full warnings of constitutional rights, the Court found the statements inadmissible because they were not given voluntarily.[188]

The Court recognized that the inherent coercive pressures of custodial interrogations would force defendants to speak where they would not otherwise do so freely.[189] To resist these pressures and to safeguard the privilege against self-incrimination, the Court announced suspects had to be "adequately and effectively apprised of [their] rights" prior to the questioning.[190]

The Court held that for a confession to be considered voluntary, a suspect in custodial interrogation must be warned "[p]rior to any questioning, . . . that he

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180. *Miranda*, 384 U.S. at 444.

181. Arizona v. Fulminante, 499 U.S. 279, 285–86 (1991).

182. One could argue that this is no different from the contract law defense of duress where a party's consent would be invalid if the consent was given under duress. Duress under contract law is a defense where the party seeking to invalidate consent has the burden of proof. In the *Miranda* context, there is a presumption of non-consent in favor of the party seeking to invalidate consent. This is also different from the situations where law disregards consent altogether for example, in contract law, consent by a minor is presumed to be invalid, in criminal law, consent is not a defense against a rape where the victim is a minor. In those situations, the law presumes that the parties are not capable of consenting. In the *Miranda* context, the defendant is capable of consent, but the *Miranda* rule presumes that consent is invalid unless the defendant is given the necessary information in the form of the required warnings.

183. *Miranda*, 384 U.S. at 444.

184. *Id.* at 445.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 467.

190. *Id.*

has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[191] The *Miranda* warnings mandated by the Court are designed to provide the defendant with the necessary information to provide an informed consent.[192]

III. SAME QUESTION, BUT DIFFERENT APPROACHES—POSSIBLE EXPLANATIONS FOR THE DIVERGENCE

Courts are faced with the same factual question in all three contexts: has the consenting party actually consented? Why have courts developed different approaches, retaining the simple consent approach in contract disputes while adopting heightened standards for consent in medical treatment and criminal confession cases? This section offers some possible explanations for this divergence.

Multiple factors contribute to the divergent approaches. Consent plays a different role in contract disputes from that in medical treatment and criminal confession cases. Courts adopted the heightened consent inquiry in medical treatment and criminal confession cases in response to significant social changes and increased public awareness of individual rights and the need to protect individuals from potential abuses and arbitrary government power. In the economic area, although business practices have changed dramatically, courts have retained the simple consent approach based apparently on business justifications.

A. Different Contexts, Different Interests, and Different Approaches

The divergent approaches can be explained by the different contexts in which the consent issue is raised. Consent in contract law is intimately associated with important aspects of our very identity including individual autonomy and freedom of contract. Contracts deal with economic relationships. Interests being protected in medical and criminal cases are different. In medical treatment cases, courts are trying to protect the right to bodily integrity. In criminal cases, courts are trying to protect a person's right to life, liberty, and against arbitrary government power.

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191. *Id.* at 444.

192. For a discussion of courts' treatment of confession where the accused gave confessions after the *Miranda* warning, please *see* Garrett, *supra* note 6, at 1092 (examining false confessions in forty cases).

1. Consent's Role in Contractual Relationships

Consent is the *sine qua non* of contract.[193] Because of a commitment to individual autonomy and freedom of contract, courts have always focused on enforcing parties' intent and refrained from interfering in parties' contractual relationships.[194] In addition, contract law is conventionally viewed as protecting private parties' economic relationships.[195] Consent is the basis to impose obligations on both parties to the contract. The simple consent approach favors the finding of a contract while a heightened consent approach would have led to a finding of no contract.[196]

The simple consent approach in contract law has been justified based on economic liberties and freedom of contract.[197] With the prevalence of form contracts and e-commerce, courts began relying on economic justifications to enforce contracts based on observable signs of consent.[198] The Supreme Court enforced a forum selection clause based on the business' need to limit the fora in which it could be sued, the potential to save litigants time and conserve judicial resources, and the reduced cost for cruise passengers.[199] Other courts also relied on market place justifications to enforce contract terms based on verbal or non-verbal signs of consent. Because it would be practically difficult to convey all the contract terms at the time of a sale, accepting the consenting party's verbal or non-verbal signs as evidence of consent would help reduce transaction costs,[200] saving both contractual parties money.[201]

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193. Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1293 (1989).

194. West, *supra* note 47, at 384.

195. Contracts have also been used to deprive people of their access to courts and right to a jury trial through arbitration agreements. *See* Leonhard, *Dangerous or Benign Legal Fictions*, *supra* note 9, at 421–22. It is beyond the scope of this paper to explore all the rights affected by the judicial consent approach when adjudicating contract dispute.

196. *Id.* at 407–08, 416.

197. Leonhard, *Unbearable Lightness of Consent*, *supra* note 2, at 57.

198. *Shute*, 499 U.S. at 593–94 (1991).

199. *Id.*

200. Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 584 (2005) (noting that "[c]ourts have typically been enthusiastic about upholding private exchanges to protect commerce, the business community, and the efficiency of the marketplace"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983); *Hill*, 105 F.3d at 1149 ("Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.").

201. Zalesne, *supra* note 200, at 586 ("Adhesion contracts are beneficial to both businesses and consumers. Standardization of terms 'reduces transaction costs . . . and stabilize[s] the incidents of doing business,' thereby saving both the buyer and seller money.").

2. Role of Consent in Protecting the Rights to Self-Determination and Bodily Integrity

Consent plays a different role in medical treatment cases. In these cases, doctors are using consent to avoid liability to the consenting patients.[202] The interests at stake are the patients' right to bodily integrity and self-determination. A heightened standard of consent protects individual rights while a simple consent approach, which would lead to a finding of consent, would have resulted in undermining those rights.

The desire to protect individual rights motivated the courts to move away from the simple consent approach to the informed consent approach. In rejecting the voluntary act of seeking medical treatment as consent, the *Pratt* court described what it called "the right to the inviolability of his person" as having "universal acquiescence."[203] The court explained that universal right meant that doctors were prohibited from violating the bodily integrity of patients without permission.

Other courts echoed the same sentiment by focusing on the patient's right to self-determination. Justice Cardozo famously stated: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault for which he is liable in damages."[204]

3. Role of Consent in Protection of Liberty and Against Arbitrary Government Power

Consent in criminal confession cases serves as a shield to protect the accused against invasion of the accused's liberty interests and arbitrary government power. A heightened consent inquiry affords the accused more protection than a simple consent approach.

In criminal confession cases, courts recognized the right not to be compelled to testify against oneself as "resting on the law of nature."[205] The Court pointed out that the importance of the right not to testify against oneself was reflected in the fact that the right was embodied in the Constitution.[206]

Distrust of arbitrary government power is part of our national identity. The Bill of Rights is designed to curb excessive government power.[207] The *Miranda*

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202. *See, e.g.*, *Salgo*, 317 P.2d at 181.

203. *Pratt*, 118 Ill. App. at 166.

204. *Schloendorff*, 105 N.E. at 93.

205. *Bram*, 168 U.S. at 545.

206. *Id.* at 544–45 (relying on *Brown v. Walker*, 161 U.S. 591, 596–97 (1896)) (acknowledging the maximum "Nemo tenetur seipsum accusare" being "clothed in this country with the impregnability of a constitutional enactment.").

207. *Miranda*, 384 U.S. at 459 ("Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty.").

decision reflects courts' concerns about exercise of arbitrary government power which could violate fundamental principles of liberty and justice.[208] The Court did not want a trial to be a mere pretense where the state obtained a conviction solely based on coerced confessions.[209] The Court believed that respect for the inviolability of the human person demanded that the state had the burden to produce evidence against an individual through its own work, rather than by compelled confessions.[210]

Courts were also aware of the temptation for police to exert undue pressure on witnesses.[211] Confessions have always ranked high on the scale of incriminating evidence.[212] The Court believed that condoning the use of coerced confessions would undermine the legitimacy of our system of law and justice.[213] At the same time, the Court was also concerned about the difficulty of judicial search for informed consent under the totality of the circumstances standard, noting that "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation."[214]

B. Judicial Preference of Protection of Liberty Interests Over That of Economic Interests[215]

Courts have traditionally erected additional safeguards to protect people's liberty interests against arbitrary government power. Courts have treated economic and property interests as second-class rights less deserving of protection.[216] The judicial attitude may reflect the belief that property interest, if damaged, can be compensated for by some other form of property interest

208. *Id.* at 459–60.

209. *Brown*, 297 U.S. at 286.

210. Chambers v. Florida, 309 U.S. 227, 235–38 (1940).

211. *Brown*, 161 U.S. at 595–97.

212. *Id.*

213. *Haynes*, 373 U.S. at 519.

214. *Miranda*, 384 U.S. at 468–69.

215. It is beyond the scope of this article to examine why courts have maintained such a distinction or whether courts should maintain such a distinction. For an interesting discussion about the Supreme Court's economic rights jurisprudence, *see* Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995).

216. CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 154 (2007); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (noting that liberty rights are preferred over property rights when courts balance them against each other); Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91, 124 (1998).

while liberty interests affect everyone—"diminish one and all are diminished."[217]

This judicial bias in favor of liberty interests is reflected in multiple judicial approaches. For example, the Supreme Court employs a heightened standard to scrutinize government restrictions on liberty interests, but a deferential lower rational basis scrutiny regarding government regulations on economic interests.[218] The different burdens of proof in civil and criminal cases show that courts favor protection of people's liberty interests over their economic interests.[219] In civil cases, a plaintiff generally only has to prove a claim by a preponderance of the evidence in order to recover against a defendant.[220] In criminal cases, the government has to prove an accused is guilty beyond a reasonable doubt.[221]

Medical treatment and criminal confession cases implicate liberty interests deemed important by courts. The desire to protect those liberty interests may explain why the courts' consent approach evolved from simple consent to heightened consent scrutiny in those cases. Contract disputes, on the other hand, involve primarily economic interests. Here courts are apparently content with the simple consent approach.

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217. Kidwell, *supra* note 216, at 124.

218. W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (noting that the state may promulgate any regulation justified by a rational basis under the due process clause as opposed to a more limited power when more fundamental restrictions such as those associated with speech and press are involved).

219. Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839, 854–56 (2013).

> [T]he level of the standard of proof expresses important societal values. If the individual or group interest invaded is considered of moderate social importance or the degree of invasion of that interest is likewise seen as moderate, then the lower preponderance standard of proof suffices. But if the interest invaded is seen as highly important or its degree of invasion as extreme, the higher beyond a reasonable doubt standard is required. . . . [B]ecause we value some things more than others, our tolerance for error in finding the facts and in applying the law varies. The preponderance standard tolerates a fairly significant risk of error; the beyond a reasonable doubt standard permits much less of a risk. *Id.*

220. McCormick on Evidence § 339 (John William Strong et al. eds., 4th ed. 1992).

221. In re Winship, 397 U.S. 358, 361 (1970).

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. *Id.*

C. Significant Social Events Coincided with the Heightened Consent Inquiry

Courts do not operate in a vacuum. What happens in society affects judicial decision making.[222] American society underwent tremendous change during early and mid-twentieth century. Those changes contributed to the development of judicial consent jurisprudence in medical treatment and criminal confession cases.

The Enlightenment philosophies have had a dramatic effect on American society since the founding of the country.[223] The leading American thinkers adopted the Enlightenment ideas of freedom, democracy, and reason as the primary values of society.[224] Common people were becoming increasingly aware of their individual rights.[225]

After the Second World War, reports about Nazi doctors' medical experiments on prisoners shocked the public's conscience.[226] In the 1960s, scholars began raising concerns about medical experiments without the subjects' consent.[227] Although these notorious abuses did not occur in medical treatment settings, their publicity increased the public and judicial awareness of the importance of the right to bodily integrity and the potential for abuse. [228]

Courts' opinions in the medical treatment cases reflected this increased awareness among the public at large. In medical treatment cases, courts rested their analyses on a person's right to self-determination. As the court announced in *Natanson*, "each man is considered to be the master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery or other medical treatment."[229]

In criminal confession cases, courts note extensively the historic lessons from unjust methods of interrogation against the accused.[230] Decided during the Civil Rights Movement in the 1960s, the *Miranda* case cited contemporaneous reports of police resorting to brutal tactics to obtain coerced confessions.[231]

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222. Eric J. Segall, *The Skeptic's Constitution, Remnants of Belief: Contemporary Constitutional Issues by Louis Michael Seidman and Mark V. Tushnet (Oxford University Press 1996)*, 44 UCLA L. REV. 1467, 1504 (1997) (pointing out that judicial decision-making changes reflect evolving societal understandings).

223. Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMANS. 311, 322–23 (1992).

224. *Id.*

225. FADEN & BEAUCHAMP, *supra* note 47, at 87 (suggesting that the increased legal interest in the right of self-determination reflected the social movements at the time).

226. *Id.*

227. *Id.*

228. Szczygiel, *supra* note 94 at 193–95 (describing a cancer study involving doctors injecting live cancer cells into chronically sick patients without the patients' consent and other experiments including the infamous Tuskegee syphilis experiment).

229. *Natanson*, 350 P.2d at 1104.

230. *Brown*, 161 U.S. at 596–97.

231. *Miranda*, 384 U.S. at 445–46.

In the economic arena, business practices have changed as well because of technological advances and the pivot to digital commerce.[232] Businesses have been relying on standard and online forms which have been enforced by the courts even though there is no meaningful consent. Although many legal scholars have been critical of the courts' consent approach, those practices have not generated outrage equal to that which followed reports of abuse in medical experiments or confessions compelled by police brutality.

D. Human Cognitive Biases and Consent Jurisprudence

Judicial resistance to change in contract disputes may also be explained by the mere fact that judges are human beings with flawed human decision-making processes. During the last few decades, scientific studies have shown humans often make decisions automatically based on intuition (referred to as System 1) unless something triggers a more deliberate thinking process (referred to as System 2).[233] System 1 thinking relies on mental shortcuts and coherence to make decisions.[234] System 2 thinking is more deliberate and is triggered only when our brain is stimulated by jarring reminders.[235]

In contract disputes, the simple consent approach is more consistent with judges' and society's beliefs about individual autonomy and freedom of contract.[236] Judges have often declined to scrutinize contract parties' agreement because of deference to parties' freedom to contract.[237] Judges lack reminders to engage in more deliberate thinking, i.e., heightened scrutiny of consent.[238] Indeed, it is easier for judges to indulge in the consent fiction than to challenge it because the simple consent approach will lead to a finding of a valid contract while a heightened inquiry would result in a finding of an invalid contract.[239]

In medical treatment and criminal confessions, medical abuses and police brutality serve as powerful reminders for judges to question the assertion of consent.[240] That reality is inconsistent with the judges' own belief system and

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232. Marks, *supra* note 64, at 499.

233. *See* Leonhard, *Dangerous or Benign Legal Fictions*, *supra* note 9, at 395–400 (for a detailed description of System 1 versus System 2 thinking and common cognitive biases that human beings suffer) and references therein.

234. *Id.* at 396.

235. *Id.* at 396–97.

236. *Id.* at 416; Leonhard, *Unbearable Lightness of Consent*, *supra* note 2, at 64–65; White, *supra* note 19, at 138–39.

237. *See* Leonhard, *Dangerous or Benign Legal Fictions*, *supra* note 9, at 415–17 for a detailed analysis on why it is easier for the judges to stay with the simple consent approach.

238. *Id.*

239. *Id.* at 416.

240. *See Miranda*, 384 U.S. at 445–46; New York v. Portelli, 205 N.E.2d 857, 857 (1965).

therefore, triggers a more deliberate thinking process which forces judges to examine if consenting parties actually consented.[241]

Thus, social science research shows, the human decision-making process will lead to a heightened consent scrutiny in medical treatment or criminal confession cases. System 1 intuitive thinking will warn judges automatically against the dangers of consent in medical treatment and criminal confession cases. There is universal agreement that it is wrong to experiment on people or to use confessions against them without their consent. Therefore, it is easier for judges to apply heightened scrutiny of consent because that approach is more coherent with the universal (and with judges') world view.[242] These jarring reminders do not exist in contract disputes. In fact, the opposite is true. Powerful business interests benefit from the simple consent approach and have been promoting the underlying economic theories to justify the judicial approach.[243]

CONCLUSION

This brief overview of selected case law from the late 19th century until the present shows that courts have approached the factual question of consent differently in the three selected areas. In contract law, courts have retained the original 19th century focus and are limiting inquiry to identifying observable verbal or non-verbal communications of consent. In contrast, in both medical treatment and confession cases, courts' search for consent evolved from an initial focus on observable signs of consent—verbal or non-verbal communications—to an inquiry into the quality of consent. In those two areas, courts are not relying on observable signs of consent and have adopted the informed consent doctrine, albeit phrased differently in criminal confession cases.

The most dramatic consent approach is *Miranda*'s presumption of non-consent in a custodial interrogation. The *Miranda* standard rejects observable signs of consent—the voluntary act of making or signing a confession—in a custodial interrogation where police failed to provide necessary information for the accused to make an informed decision.

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241. Leonhard, *Dangerous or Benign Legal Fictions*, *supra* note 9, at 405 ("In sum, legal fictions that have some built-in reminders are benign because the reminders serve to activate System 2 thinking, resulting in better decision making.").

242. *See id.* at 417.

> The consent concept in many ways allows us to embrace a world view coherent with the ideal image that we would like to have. And coherence is the guiding principle underlying the maintenance of "quick judgment" System 1 heuristic thinking. Judges, like all other humans, have a strong need for coherence. Respect for consent means respect for our individualism and autonomy. Judges intuitively rely on consent as the basis for enforcing agreements when there is nothing reminding them that signature, clicking, and browsing are only reifications of consent, not complete proof of actual consent. *Id.*

243. White, *supra* note 19, at 149–50.

These differences can be partially explained based on different roles consent plays in each context and social changes over the examined period. Heightened consent inquiry reflects judicial bias in favor of stronger protection of individual rights to bodily integrity, self-determination, and liberty and protection against arbitrary government power. In addition, the divergent approaches may reflect human cognitive biases in judicial decision-making process.

This overview across time and context offers a few insights about judicial consent jurisprudence. First, courts have clearly recognized that verbal and non-verbal communications of consent do not necessarily reflect internal mental processes and reliance on observable signs of consent may not promote individual autonomy in some situations. Courts have rejected the simple consent approach in at least two areas—medical treatment and criminal confession cases. Second, courts are willing and able to fashion different standards to ascertain consent. They adopted a heightened standard of consent when interests at stake are deemed more important—right to bodily integrity, individual liberty, and protection from arbitrary government power. In sum, this overview shows that United States courts are capable of calibrating their consent approach to search for informed consent—if they are willing.