

UNILATERAL MISTAKE: THE BASEBALL CARD CASE

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Twelve-year-old card collector Bryan Wrzesinski, owner of some 40,000 baseball cards, spotted a 1968 Nolan Ryan/Jerry Koosman rookie card at the Ball-Mart, a newly opened baseball card store in Itasca, Illinois. The price of the card was marked as "1200/." An inexperienced sales clerk interpreted this figure to mean \$12.00 and accepted that amount in exchange for the card. The proprietor of the Ball-Mart, Joe Irmen, claimed that the card had been offered for sale at \$1,200 (a price in line with its market value) and asked for it back. Wrzesinski refused to reverse the transaction. After two days of trial on Irmen's suit for replevin or money damages, and moments before the judge was to issue her decision, the parties announced a settlement: the card would be sold at auction and the proceeds given to charity.¹

The baseball card case offered a striking, two-edged paradigm for the contract doctrine of unilateral mistake. Its culmination in this resounding anticlimax, after weeks of public attention, seemed to bear out what was already apparent to anyone who had been discussing the case (as I had) with lawyers and law professors. Almost nobody, these days, understands how cases of unilateral mistake ought to be decided—or why.

The answers to these questions turn out to be both important and controversial, because the issue presented by the baseball card case is actually a very broad one. How should the law regard contracts formed between people who possess different (perhaps widely different) information relating to the subject matter of the transaction? The traditional

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1. *Irmen v. Wrzesinski*, No. 90 SC 5362 (Ill. Cir. Ct. DuPage County [Small Claims Div.] filed June 29, 1990). A full account of the controversy and the ensuing litigation may be found in the following articles: John Leptich, *Boy Sued Over Baseball Card*, CHI. TRIB., Nov. 10, 1990, § 1, at 1; John Leptich, *13-Year Old Throws Judge a Curve*, CHI. TRIB., Mar. 6, 1991, § 1, at 1; John Leptich, *Finally, It's Bottom of 9th in Baseball Card Case*, CHI. TRIB., Apr. 5, 1991, § 3, at 2; John Leptich, *Charity Delivers Winning Pitch in Baseball-Card Suit*, CHI. TRIB., Apr. 23, 1991, § 3, at 1. See also Lisa Twyman Bessone, *What a Card*, SPORTS ILLUSTRATED, Mar. 18, 1991, at 9; Mark Hansen, *Major League Dispute*, A.B.A. J., June 1991, at 24.

response is a function of some of the first principles of classical contract theory: it has become relatively inaccessible because the relevant principles have long been under attack. Competing modern answers to the baseball card dispute, inconsistent both with traditional theory and with each other, come from the most visible schools of present-day contract theory. On the one hand stand the authors of the *Restatement (Second) of Contracts*, who want to make contracts fair; on the other the law-and-economics writers, who want to make contracts efficient. Meanwhile, the claims of standard theory have been neglected so long they are no longer understood. If we lose track of the standard theory, however, we lose the only intelligible explanation of the decided cases. We lose, in addition, a practical, compromise solution to the pervasive problem of asymmetric information—one that is arguably the most efficient way to deal with the problem, if costs of administration are taken into account.

If Bryan Wrzesinski knew that the valuable card was not being offered for sale at \$12.00 by its owner (notwithstanding the mistake by the owner's agent), the case presents a textbook illustration of the exceptional kind of unilateral mistake that has always been held to prevent formation of a contract. The facts are particularly striking because they resemble, with one critical difference, a more common sort of unilateral mistake as to value—but one that has ordinarily been held to be no defense to contractual obligation. If Joe Irmen had in fact been offering the card for \$12.00, in ignorance of its value, his mistake would be equally as grave; the terms of the exchange would be equally unbalanced; and the fact of his mistake would be no less apparent to a better-informed buyer. Yet standard doctrine affords Irmen no relief in the latter situation. The baseball card case illuminates the distinction and, by extension, illustrates both rules.

Traditional mistake doctrine harmonizes these superficially contrasting results, and it explains the results in the majority of decided cases better than the competing suggestions of either the *Restatement* or the law-and-economics literature. Unilateral mistake, in the standard account, is a potential obstacle to contract formation. From this perspective, the unilateral mistake that might (though only in certain circumstances) prevent formation of a contract is the kind that obstructs "mutual assent," alias "a meeting of the minds." The purpose of granting relief is accordingly to ensure—within important practical limits—that only voluntary acts of the contracting parties give rise to legally enforceable promises. This common sense, admittedly "subjective" view

of the matter persists as a frequent theme in the decisions: it is probably more familiar today to practitioners than to law professors.² It is, of course, inconsistent with the "objective" theory of contracts that insists—against all the evidence—that contract law is not concerned with the parties' state of mind, merely with their outward expressions of intent. The objective theory has been academic orthodoxy for most of this century, and what is here called "standard doctrine" finds no place in either the first or the second *Restatement*.

The two *Restatements*, it should be noted, treat the subject of unilateral mistake in significantly different ways. While the first *Restatement*, faithful to objective theory, virtually excluded the possibility of rescission for a "mistake of only one party,"³ the authors of the second *Restatement* were unwilling to forgo such a promising vehicle for the promotion of contractual equality. The new *Restatement* proposes instead a greatly expanded definition of relievable "mistake," potentially including a party's misjudgment not only of the nature but also of the wisdom of his bargain. The theory now acknowledged is overtly one of ethical regulation: the setting aside of a valid contract whose enforcement would be "unconscionable."⁴ Restated in this manner, the common law of unilateral mistake is radically transformed: rules that once afforded a qualified promise of individual autonomy are employed instead to police the fairness of the contractual exchange.

When one party to the transaction is *aware* that the other is laboring under a mistake as to value—as was apparently the case with Bryan Wrzesinski and the clerk at the Ball-Mart—the problem of unilateral mistake becomes indistinguishable from its converse, that of a contracting party's freedom to withhold information in the course of negotiations. It is this aspect of the question, seemingly susceptible to arguments based on the economics of information, that has received the

2. For a relatively modern statement of the traditional, "subjective" view of unilateral mistake defended in this article, see 17 C.J.S. CONTRACTS § 135 (1963 & Supp. 1991) (citing numerous cases). It is interesting to note the divergence of views on fundamental contract theory between the West Publishing Company and the American Law Institute. The relative confusion prevailing among academic commentators on the subject of unilateral mistake results in part from the fact that they are more likely, as a group, to find their contract theory in the *Restatement* than in the *C.J.S.*

3. "A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable . . ." RESTATEMENT OF CONTRACTS § 503 (1932). Comment *a* states explicitly that "[t]here is a contract formed by the acceptance of an offer even though the offer is made under a mistake or fails to express what the offeror intends."

4. See RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981), quoted *infra* in text accompanying note 45.

most scholarly attention in recent years. Law-and-economics commentators have attempted to identify the circumstances in which a legal rule compelling the disclosure of information would induce more efficient behavior by contracting parties.⁵ Other writers have likewise argued for an expanded duty of disclosure, but on the basis of such nonutilitarian premises as fairness and "contractarian" theories of justice.⁶

In explicating the contrasting common-law rule, with its narrowly limited duty of disclosure, the purpose of this Article is not so much to refute these modern arguments as to clarify the choice they represent. Modern trends in judicial and academic interpretation have succeeded in obscuring the rationale of traditional unilateral mistake doctrine to the point that many observers no longer recognize or understand it. Their rationale forgotten, the pattern of the decided cases becomes hard to explain. And while professors devise new theories to make sense of the decisions, rival objectives for unilateral mistake doctrine press forward to fill the gap uncertainty creates.

5. See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEG. STUD. 1 (1978) (suggesting that the law protects, and should protect, information obtained by conscious search but not information fortuitously obtained); Robert L. Birmingham, *The Duty to Disclose and the Prisoner's Dilemma: Laidlaw v. Organ*, 29 WM. & MARY L. REV. 249 (1988) (emphasizing the inefficiency of overinvestment in the search for information); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 259-61 (1988) (identifying the information that deserves legal protection as "productive facts" as opposed to "redistributive facts"); MICHAEL J. TREBILCOCK, *Asymmetric Information Imperfections*, in *THE LIMITS OF FREEDOM OF CONTRACT*, ch. 4 (forthcoming 1993) (proposing "a general presumption in favour of disclosure of material facts known to one party and unknown to the other," subject to exceptions wherever "enforced disclosure [will] reduce incentives for first parties to generate and utilize the information in the first place"); Steven Shavell, *Acquisition and Disclosure of Information Prior to Economic Exchange*, Discussion Paper No. 91, Program in Law and Economics, Harvard Law School (April 1991) (proposing that sellers (always) and buyers (sometimes) would behave more efficiently if disclosure were mandatory). Cf. Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J. L. & PUB. POL'Y 639, 691-707 (1989) (suggesting that while a rule permitting nondisclosure may not be efficient in itself, it may be justifiable on the basis of the administrative cost of enforcing disclosure requirements); Christopher Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 CASE W. RES. L. REV. 329 (1991).

6. The argument that the law should refuse to enforce a contract in which one party has taken unfair advantage of his superior information is as old as Cicero; more recent exponents among law professors include such distinguished authorities as W. Page Keeton, William Prosser, and George Palmer. See GEORGE SPENCER BOWER, *THE LAW OF ACTIONABLE MISREPRESENTATION* 440-41 (2d ed. 1927) (discussing the relevant passage from Cicero's *De Officiis*); W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31-37 (1937); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 106 (4th ed. 1971); 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 12.3 (1978). Arguing on the basis of a Rawls-inspired "contractarian theory of law," Kim Lane Scheppele has suggested that a party be required to disclose superior information to which the other party has "unequal access." KIM LANE SCHEPPELE, *LEGAL SECRETS* 119-24 (1988).

The traditional account of unilateral mistake needs to be better understood if the relative advantages and disadvantages of these alternatives are to be accurately measured. Standard doctrine on unilateral mistake affords an effective, practical compromise between two significant but conflicting values: the protection of personal autonomy, from which it follows that all contractual obligation ideally should be voluntary; and the security of contract-based expectations, which requires that contracting parties in most cases be liable to be taken at their word. The rule that works this compromise is so simple and so administratively economical that it may well be more socially efficient, when costs of administration are taken into account, than rules designed to induce more efficient contracting behavior by increasing the legal duty to disclose information.

Part I of this Article revisits the traditional account of unilateral mistake, arguing that a "subjective" theory focused on requirements of contract formation still provides the most convincing explanation of the case law and the best rule of decision. Part II suggests that the original limits to relief for unilateral mistake came to be expanded as an unintended consequence of the Holmes/Williston "objective theory" of contract, though the present-day consequences of this development are very far from what either scholar would have approved. Part III examines the alternatives to the traditional conception of unilateral mistake currently advanced by influential schools of modern contract theory. On one side, the American Law Institute—as part of its overall concern with contractual equality—has attempted to make "unilateral mistake" a doctrine that will potentially relieve against a party's unconstrained mistake as to cost or value. From a very different perspective, law-and-economics writers have argued that the freedom to decide what information we wish to disclose in the course of negotiations leads to inefficient behavior because parties will invest resources in information-gathering that exceed the social return of the information produced. The implicit prescription of the economic models is for legal rules that would reverse, in many ordinary bargaining situations, the privilege of disclosing or withholding information as one's assessment of self-interest might dictate. The costs (under various headings) of administering such rules have not generally been examined.

I. A NOTE ON *IRMEN V. WRZESINSKI*

The standard doctrine of unilateral mistake is most easily examined in the context of a sale, preferably one in which the mistake is made by the

seller. (Comparable mistakes by a buyer, whether or not known to the seller, will frequently be rectified by a seller's express or implied warranties).⁷ The basic propositions may be presented in three paradigm cases:

[A] Irmen offers a card for sale at \$1,200, which his agent interprets to mean \$12.00. Wrzesinski knows the card is not being offered at \$12.00. He cannot form a contract with Irmen (through Irmen's agent) to buy it at \$12.00.⁸

[B] In ignorance of its value, Irmen is offering for \$12.00 a card worth \$1,200. Wrzesinski knows the value of the card, and buys it in anticipation of a profitable resale. So long as Wrzesinski and Irmen are in no special relationship,⁹ and so long as Wrzesinski's superior information was not wrongfully obtained,¹⁰ the contract is not subject to rescission.¹¹

7. Thus a buyer's unilateral mistake about the quality of certain merchandise—his assumption that goods offered for sale by a merchant will be fit for the use to which they are ordinarily put—will be corrected, well short of mistake doctrine, by the implied warranty of U.C.C. § 2-314. Because buyers are not commonly thought to make any implied representations to sellers, cases in which the seller is mistaken present the more fruitful paradigms.

A seller is more frequently under a duty to disclose defects peculiarly within his own knowledge than he was a hundred years ago: one whose house is infested with termites may be required, not only not to disguise, but affirmatively to disclose the defect. *Compare* Swinton v. Whitinsville Sav. Bank, 42 N.E. 2d 808 (Mass. 1942) (seller may remain silent) *with* Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960) (seller must disclose). This more liberal allowance of implied warranties, however, has relatively little to do with the doctrine of unilateral mistake or with an abstract duty to disclose superior information. Courts properly find an implied representation whenever the ordinary buyer's expectations make a seller's silence tantamount to a representation that an undisclosed state of facts does not exist; but sellers, by this test, are still very far from a generalized duty to disclose superior information. We do not expect the seller to reveal the lowest price he would accept for his goods, nor the name of a competitor who would offer a better deal, although both pieces of information are material to the buyer's decision and peculiarly within the seller's knowledge.

8. *See, e.g.*, 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 610 (1960) (citing cases). The proposition that manifest error vitiates consent may be traced in American law to 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *477 (1826) ("Non videntur qui errant consentire"). The principle is readily apparent in numerous cases holding that one cannot form an enforceable contract by "snapping up" an offer too good to be true. *See, e.g.*, United States v. Braunstein, 75 F. Supp. 137 (S.D.N.Y. 1947) (seller "confirms" a price of "10 cents per box," meaning "10 cents per pound," for what buyer knows to be raisins packed in 25-pound boxes).

9. If the parties to a contract stand in a "relation of trust and confidence," the silence of the party with superior information will be tantamount to misrepresentation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161(d) (1981). There is a category of transactions, defined by practical considerations, in which even those who deal at arm's length are placed by the law in an implied relation of trust and confidence. Contracts of suretyship and insurance have long been so regarded, 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 214-217 (1835); modern decisions have expanded the category without altering its basic definition. *See* Keeton, *supra* note 6, at 34-36.

10. "Suppose a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark shewing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist." Phillips

[C] As in case [A], a card priced at \$1,200 is accidentally sold for \$12.00; but Wrzesinski, a novice collector, has no reason to know of Irmen's mistake. By contrast to the result in case [A], a valid contract is formed; though it may be subject to rescission if there has been no reliance on the part of the buyer.¹²

(Symmetry suggests a fourth case, in which both buyer and seller are mistaken about the value of the card; but the resulting problem is usually categorized as mutual rather than unilateral mistake).¹³

Solid authority supports these predictions about outcomes, and tradi-

v. Homfray, 6 Ch. App. 770, 780 (1871). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 161, illus. 11 (1981) (buyer learns of valuable mineral deposits by trespassing on seller's land).

11. See, e.g., 3 CORBIN, *supra* note 8, § 605 ("by business custom, by prevailing mores, by social policy, and by existing law, the rule is caveat emptor. It is also, and in equal degree, caveat vendor."); 1 STORY, *supra* note 9, §§ 204-205 ("A Court of Equity will not correct, or avoid a contract, merely because a man of nice honor would not have entered into it. The case must fall within some definition of fraud; and the rule must be drawn, so as not to affect the general transactions of mankind."). The classic American decision is *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817), involving a purchase of tobacco on the strength of information, not disclosed to the seller, that would shortly cause a sharp increase in the market price: the facts of *Laidlaw* are summarized *infra* note 52. In the equally venerable English case of *Fox v. Mackreth*, 2 Bro. C.C. 400, 420, 29 Eng. Rep. 224, 234 (Ch. 1788), the court stated that a buyer at arm's length who knew of a valuable mine underneath the seller's property might buy at the price of farm land, without disclosing his superior information. See BOWER, *supra* note 6, § 91, for the numerous English cases in which *Fox v. Mackreth* has been treated as authoritative.

12. The basic rule is set forth in the RESTATEMENT OF RESTITUTION § 12 (1937) (denying rescission "because of a mistake which the other [party] does not share and the existence of which the other party does not know or suspect"). The possibility of rescission nonetheless, when the mistake is of a kind that negatives mutual assent and the nonmistaken party has taken no action in reliance, is clearly established by the decisions. See *Miller v. Stanich*, 230 N.W. 47, *rev'd on reh'g*, 233 N.W. 753 (Wis. 1930), in which an illiterate landlord, presented with two versions of a proposed lease, executed the "wrong" document; rescission was allowed, evidently because of the absence of any change of position by the nonmistaken party. Cf. *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248 (Pa. 1989), enforcing as a unilateral contract a prize offer ("HOLE-IN-ONE Wins this 1988 Chevrolet Beretta") despite the fact that plaintiff's ace was hit two days after the charity tournament in connection with which the offer was made. Defendant had neglected to remove the car and the signs from the ninth tee at the conclusion of the event. The decision permitted plaintiff to accept (by performance) an offer that defendant plainly had no intention of making. The lack of detrimental reliance makes the result noteworthy.

13.

[D] As in case [B], Irmen (who does not know the value of his merchandise) is offering for \$12.00 a card worth \$1,200; but Wrzesinski, a novice collector, has no reason to know of Irmen's mistake. A contract is formed, though it may be subject to rescission so long as it remains executory.

Compare *Wood v. Boynton*, 25 N.W. 42 (Wis. 1885) (sale of yellow diamond thought by buyer and seller to be a topaz) with *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887) (sale of purebred cow mistakenly believed by buyer and seller to be barren). The unacknowledged rule of decision in these and other cases of mutual mistake as to value seems to be that rescission will be allowed if the mistake is discovered while the contract is executory and denied if the mistake is discovered thereaf-

tional contract doctrine makes them fairly easy to explain. The critical element of that doctrine, so far as it concerns relief for unilateral mistake, consists in the express recognition of "genuineness or reality of consent" as an ordinary requirement of contract formation.¹⁴ A rule concerned with the "reality of consent" necessarily implies a "subjective" theory of contract, although its "subjective" component turns out to be relatively modest. By contrast, the objective theory championed by Holmes and Williston insisted that "an expression of mutual assent"¹⁵ was all that could be necessary, since "[i]n contract, as elsewhere, [the law] must go by externals, and judge parties by their conduct."¹⁶ It followed that the state of mind of the parties was irrelevant to the question of contract formation.

In their distaste for "Kantian imperatives and Hegelian absolutes," their fear that "lawyers and businessmen would find their affairs governed by a metaphysics of will rather than the realities of the market place,"¹⁷ the objectivists left us a distinction between "subjective" and "objective" theories that was overdrawn from the start. If classical contract law tried to protect the voluntary character of contractual obligations, it placed at least as high a value on the stability of contract-based expectations. This meant that it necessarily struck a balance between two important but inconsistent objectives. Perfect autonomy might demand that each obligation reflect a purely voluntary undertaking, but practical necessity normally requires that we be able to take a person at his word, without stopping to inquire whether he knows what he is doing. Classical doctrine thus incorporates a subjective theory where it can, and an objective theory where it must.

Fraud, duress, and incapacity prevent the formation of a contract (in the subjective view) because their presence means that an outward agree-

ter. See generally Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991).

14. The phrase "genuineness or reality of consent" is the one employed by Sir William Anson in his treatise on contracts, first published in 1879. See WILLIAM R. ANSON, *PRINCIPLES OF THE LAW OF CONTRACT* §§ 10, 176, at 14, 199 (Arthur L. Corbin ed., 3d Amer. ed. 1919). (Corbin's edition of Anson is recommended for its supplementary citations to American decisions.) Anson's treatise will serve as a reference to standard contract doctrine in the last generation preceding Holmes, Williston, and the "objective theory." Present-day judicial statements of the traditional, "subjective" view of contract formation are apt to employ instead the expression "mutual assent," see, e.g., 17 C.J.S. *CONTRACTS* § 135 (1963), or the phrase "meeting of the minds."

15. 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 18 (1920).

16. OLIVER WENDELL HOLMES, *THE COMMON LAW* 242 (Mark DeWolfe Howe ed. 1963).

17. Mark DeWolfe Howe, Introduction to *id.*, at xvi.

ment is something other than the voluntary act of one of the parties. Standard doctrine asserts that certain kinds of mistakes, and not others, have the same effect of destroying the voluntary character of one party's assent. One way to explain the enforcement of the contract in case [B]—where the seller is mistaken about the value of what he sells, and the buyer is aware of the mistake—is to observe that a party's mistake as to value has not traditionally been thought to detract from the voluntary character of his agreement. Whether this is true by definition depends on our conception of what is "voluntary"; but the distinction is a natural and practical one for any legal system to draw.¹⁸ The line separating *A*, who in some fundamental sense does not know what he is doing, from *B*, who merely misjudges the advisability (moral or economic) of a course of conduct, need not be entirely satisfactory as philosophy in order to constitute a useful social rule.¹⁹

It is fairly easy, in other words, to distinguish *A* (who agrees to sell land in the belief that the legal description refers to a different tract), from *B* (who sells his farm in ignorance of the fact, known to the buyer, that a valuable mine lies beneath it); standard doctrine may possibly re-

18. It is possible to construct a definition of "voluntary" behavior that would classify as "involuntary" any action taken on the basis of less-than-perfect knowledge. Plato implies as much in his repeated, paradoxical contention that no one voluntarily commits a bad or an unjust action. See, e.g., PLATO, PROTAGORAS *345d-e; GORGIAS *509e; LAWS *731c, *860d. From a less rarified point of view, however, and as a matter of either law or ethics, such a definition of voluntary conduct would seem to be self-defeating. The practical rule of the common law—allowing excuse for a person's mistake about what he is doing, but not for ignorance as to the merits of a chosen course of conduct—parallels the ordinary teaching of ethics on this point. Thus Aristotle identifies ignorance and constraint (or "duress") as the two circumstances that render an action involuntary; but the "ignorance" to which he refers is the kind that would negative mens rea in a criminal prosecution (as where a friend administers poison, believing it to be medicine), rather than the kind that would prevent one person from acting as wisely and as virtuously as another. See ARISTOTLE, THE NICHOMACHEAN ETHICS, book III, *1109b-11b (M. Ostwald transl. 1962).

19. The same practical necessity—that our standard of "voluntariness" not be set so high as to undermine the security of ordinary transactions—has given similar contours to the legal treatment of duress. Duress is grounds for relief only if it interferes with the voluntary character of a party's action or undertaking: "the coercion must have caused a party to do something he otherwise would not have done." 2 PALMER, *supra* note 6, § 9.2 at 247. Yet a constraint meeting this test of causation must in addition be "wrongful"—a quality notoriously difficult to define—if it is to have legal consequences. See *id.* § 9.3. "Voluntary action" cannot require unconstrained choice (any more than it can require perfect information), since in a world of scarce resources few if any bargains could meet either test. The law's definition of "duress" to exclude the coercive effects of scarcity (where the scarcity has not been created by the other party's wrong) thus parallels the traditional definition of "mistake" to exclude imperfect information as to value (where the imperfect information has not been induced by the other party).

lieve *A* but will not relieve *B*.²⁰ Why the common law should see a difference in the cases is not hard to understand. Relief for unilateral mistake as to value is antithetical to the individualistic values on which the classical theory is based, since to relieve a party of the responsibility for making his own bargain also deprives him of the freedom to do so.²¹ Moreover, in the absence of rules that could limit the class of relievable mistakes by some test of relative gravity—quantitative rules of a sort that the common law lacks the means to establish—relief for unilateral mistake as to value, known to the other party, would potentially undo every deal not struck within some plausibly efficient market. Between the used car that performs better than the seller expected and the oil well sold for the price of grazing land there is only a difference of degree.

By contrast, the unilateral mistake for which traditional doctrine will sometimes grant relief is the kind that negatives a party's apparent assent. One party's unilateral mistake about the identity of the person with whom he is dealing is for this reason a likely case for rescission.²² Cases on "mistake in expression" offer equally clear examples. Presented with two versions of a draft agreement, identical except for a single point, a party signs and returns the "wrong" version. There is plainly no "genuine consent" to the terms of the written contract; if rescission can be granted without prejudice to the other party, it probably will be.²³ A person who signs a contract to purchase land in the belief that the legal

20. Compare *Bivins v. Kerr*, 108 N.E. 996 (Ill. 1915) with *Fox v. Mackreth*, 2 Bro. C.C. 400, 29 Eng. Rep. 224 (Ch. 1788).

21. It might be objected that relief for *any* sort of mistake has the same effect of diminishing individual responsibility; yet standard doctrine, as I will argue, grants relief for a variety of unilateral mistakes whose common characteristic is that the mistaken party either did not mean what he said or in some other respect did not understand what he was doing. As with the analysis in terms of "voluntariness," *supra* note 18, the question is whether a persuasive distinction may be drawn between these kinds of mistakes. When the law permits an individual to disclaim responsibility for his freely exercised choice as to the merits of a course of action, the infringement of personal autonomy seems plain; it seems far less so if the same individual merely disavows an error in arithmetic (bid based on miscalculation) or surveying (sale of "wrong" tract). From the classical insistence that individuals make their own bargains it does not follow that courts must refuse to acknowledge the possibility of errors in computation or expression.

22. It is said that when the trustees of Yale University chose a president to succeed A. Bartlett Giamatti, they first offered the job, through a unilateral mistake as to telephone numbers, to Mr. Benno C. Schmidt, a distinguished business executive whose son was then dean of the Columbia Law School. The elder Mr. Schmidt reportedly replied, "I think you want my son." Under a purely objective theory of contract, Schmidt *père* could now be President of Yale. (I have no idea whether this story is true.)

23. See *Miller v. Stanich*, 230 N.W. 47, *rev'd on reh'g*, 233 N.W. 753 (Wis. 1930).

description refers to a different tract,²⁴ or who grants a release under a misapprehension as to its scope,²⁵ can likewise protest that he never genuinely consented to the contract the other party now seeks to enforce. The contracts in all of these cases may be enforced nevertheless, despite their involuntary character, when the law chooses to protect the expectations or reliance of the nonmistaken party. But the case for rescission becomes almost unanswerable if the nonmistaken party knew or had reason to know of the mistake. A moment's reflection on the paramount significance of this factor will complete the account of the traditional rationale.

If the ideally voluntary nature of contractual obligation were the only consideration shaping the doctrine of relief for mistake, it would be impossible to form a contract with anyone who could prove, after the fact, that he had not correctly understood the terms of the transaction. The countervailing consideration, obviously enough, is the security of contractual expectations. A person who gives the appearance of assenting to a proposition normally will be held to the resulting bargain. This is not, despite Holmes's impatient assertion, because "[t]he law has nothing to do with the actual state of the parties' minds"²⁶—if this were so there could be no law of mistake—but because the ordinary functioning of society requires that one who makes an offer or a promise be liable to be taken at his word.

Traditional mistake doctrine is thus a composite, in which rules necessary to assure the stability of transactions qualify a fundamental preference that contractual liability be voluntarily assumed. While this overlay of objective theory is very broad, it extends no further than its logic. Where the other party has no expectations to be protected, it would be anomalous to impose promissory liability for an involuntary undertaking. (An "objective" analysis will ordinarily prevail, even in this instance, if only because of problems of proof. Because the precise state of mind of the "other party" is impossible to assess, the law usually protects expectations very broadly: by assuming that they exist unless the contrary plainly appears.)²⁷ By contrast, the one easy case for traditional

24. See, e.g., *Fleischer v. McGehee*, 163 S.W. 169 (Ark. 1914).

25. See *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 760-70 (2d. Cir. 1946) (Frank, J., concurring).

26. HOLMES, *supra* note 16, at 242.

27. Armstrong claims that he was only joking when he offered to sell a valuable horse for a trifling sum. The joke being over, he wants the horse back from McGehee, who "bought" it. Armstrong bears the burden of persuading a jury, not only that he was joking, but that McGehee so

doctrine is where the nonmistaken party knows or has reason to know of a mistake vitiating "genuine consent": where he knows, in other words, that the mistaken party was not in fact assenting to the "objective" transaction between them. This is case [A], in which the buyer who is aware of the seller's mistake is incapable of forming a contract.

One can profit from superior information only by inducing someone to enter into a bargain. If a person knows that the party with whom he is dealing misapprehends the "objective" terms of the negotiation, he is no closer to forming a contract on the "objective" terms than if the other party had refused his offer. In either case he knows that he has not obtained the other's assent to his proposition. He can thus form no expectation deserving to be protected. There being no countervailing consideration, freedom of contract requires that the mistaken party be protected against a contractual liability that would necessarily be involuntary.

If a party's mistake as to value were similarly perceived as destroying the voluntary character of his agreement, such a mistake (recognized by the other party) would be grounds for relief to the same extent and for the same reason. The fact that, on the contrary, the common law denies relief in the latter case thus tends to bear out our underlying premise: that a bargain entered into under a unilateral mistake as to value is not ordinarily perceived as involuntary. When a person misapprehends "objective" terms or misstates his intention, we will avoid (if we can) "holding him to an agreement he never made." Enforcing a bad bargain against someone who made a unilateral mistake as to value is seen, however regretfully, as "holding him to his agreement."

II. HOW A RULE WAS FORGOTTEN

The foregoing propositions about unilateral mistake may or may not regulate the subject in optimal fashion, but they are coherent and intelligible means to significant ends of traditional contract law. Modern proposals to rewrite the law of unilateral mistake take little account of either the means or the ends of the law that is to be rewritten. The confusion that currently reigns in this area may be traced to two sources, both somewhat fortuitous. One is the theoretical prejudice of Samuel Willis-

understood him. The "overbreadth" of this burden of proof protects innocent expectations at the cost of enforcing some jokes as contracts. See *Armstrong v. McGhee*, Addison 261 (Westmoreland County Ct., Pa. 1795), reprinted in FRIEDRICH KESSLER ET AL., *CONTRACTS* 128-29 (3d ed. 1986).

ton and the other champions of the objective theory of contracts; the other is a series of decisions in cases of mistaken bids, where a lack of judicial precision about the rule being applied inevitably led to a relaxation of the rule.

A. *The Superstitions of the "Objectivists"*

At a fundamental level, *any* doctrine permitting relief for unilateral mistake is inconsistent with a thoroughgoing "objective" explanation of contract formation. Williston saw this, and it made him nervous. "It is obvious," he noted in the first edition of his treatise, "that a doctrine which permits the rescission of a contract on account of unilateral mistake approaches nearly to a contradiction of the objective theory of mutual assent in the formation of contracts toward which the modern law seems generally to have tended."²⁸

As we have already seen, the "subjective" view starts from the proposition that formation of a contract requires "genuineness or reality of consent," and that the reality of consent can be negated by mistake, misrepresentation (innocent or fraudulent), duress, or undue influence.²⁹ Unwilling to accept that a party's state of mind could have anything to do with it, Williston put himself (and subsequent students) to considerable unnecessary trouble by insisting that the law required no "genuineness or reality of consent," merely "an expression of mutual assent."³⁰ While he naturally acknowledged that fraud, mistake, and duress had legal consequences, Williston explained that they merely provided "personal or equitable defenses to a contract"—defenses, that is, to a contract validly formed but liable for these reasons to be set aside.

In most instances it would make little practical difference whether it was said that the mental assent of the parties was the vital element in the formation of the contract, and that their words or acts proved their mental attitude, or whether it was said that their words and acts were the only essential matter in the formation of a contract. In some cases, however, the distinction is important. If it were true that the mental element was the vital matter the consequences would properly follow [in cases of unilateral mistake] . . . that unless the other party has altered his position in reliance on the mistaken expression, there would be no obligation, and even if there

28. 3 WILLISTON, *supra* note 15, § 1579 (1920).

29. ANSON, *supra* note 14, §§ 10, 176. *Cf.* 17 C.J.S. CONTRACTS § 132 (1963) ("Apparent consent may be unreal because of mistake, misrepresentation, fraud, duress, undue influence, or mental incapacity").

30. 1 WILLISTON, *supra* note 15, §§ 18, 20 (1920).

were such alteration of position the obligation would be based on estoppel rather than on contract. There seems no trace of such a doctrine in courts of law, and such equity decisions as may afford some warrant for it may be explained as well or better on the theory that a contract exists but is voidable, as on the ground that no contract exists.³¹

Williston's reluctance to acknowledge that "genuineness of consent" had anything to do with contract formation made it harder to explain either the conclusive significance, in some cases, of one party's knowledge of the other's mistake, or the fact that in other cases the same knowledge makes no difference. Williston's answer (for cases of the first type) is that where a unilateral mistake is known to the other party, the availability of relief "is based on obvious justice."³² But as he is unwilling to admit that the injustice in this case would lie in allowing the "other party" to enforce a contract he knows he has not made, Williston does not ultimately explain why there is any more "obvious justice" in denying enforcement where there is knowledge of the mistake than where there is not. Again, the insistence that "genuineness of consent" is irrelevant to contract formation barred access to the most obvious distinction between those types of unilateral mistake—known to the other party—that do and do not justify relief. If we are forbidden to think about "meeting of the minds," in other words, it becomes appreciably more difficult to distinguish even two of the most striking paradigm cases: *Laidlaw v. Organ*,³³ where seller's lack of information (known to the buyer) about facts affecting the tobacco market leads him to make a disadvantageous bargain; and *Webster v. Cecil*,³⁴ where seller inadvertently writes to buyer (in effect), "Your offer of £2,000 is insufficient, but I can let you have the property for £1,100." Yet the former contract is enforced and the latter is not.

B. *The Mistaken-Bid Cases*

If a contractor submits a bid so far below the competing bids that the owner has reason to know a mistake has been made, there is no difficulty in excusing the contractor from performance at the erroneously calculated price. The question is not whether we excuse the contractor, but why. The "subjective" answer is that the owner cannot form a contract

31. *Id.* § 20.

32. 3 *id.* § 1573.

33. 15 U.S. (2 Wheat.) 178 (1817); see *infra* note 52.

34. 30 Beav. 62, 54 Eng. Rep. 812 (M.R. 1861).

on terms he knows the contractor does not intend. To be sure, the contractor said (and meant to say) "My bid is \$5,000." But the contractor in our hypothesis has either misread the specifications for the job, or else omitted some significant items of expense, which is why the next-lowest bid is \$15,000. In either case he does not really propose to do the work described in the specifications for \$5,000, and the owner knows it. Such a bid is analogous to the sales clerk's offer to sell for \$12.00 a baseball card priced at \$1,200, when the customer recognizes the mistake being made. If there is neither genuine consent on the one hand, nor justifiable expectation or reliance on the other, there is either no contract at all or no contract that merits enforcement.

Rigorous "objectivism," as already noted, makes this simple case harder to explain: why should knowledge of the mistake make any difference? More to the point, a narrowly objective view of the mistaken-bid cases also makes them, ironically, far more threatening to the security of transactions ostensibly served by the objective analysis. If our reason for relieving the mistaken bidder is no longer "lack of genuine consent, known to the other party" (a rare occurrence, and even more rarely provable), but rather "obvious justice" (the explanation to which Williston was driven), then a vast range of transactions become candidates for rescission on what many will see as identical grounds. Such transactions include, in particular, advantageous bargains made by persons enjoying superior information as to value.

Twentieth-century American decisions have become consistently more liberal in granting relief from the consequences of a mistaken bid. During the initial phase of this evolution, the liberalizing decisions occurred almost exclusively in cases where the owner had reason to know of the contractor's mistake.³⁵ Courts then began to remark that it would be "unconscionable" to allow the owner to hold the contractor to a bid that was manifestly the result of an error.³⁶ In context, what was "unconscionable" was to permit one party to enforce a bargain to which, to his knowledge, the other party had not genuinely assented. But it was easy

35. There is a helpful summary of the earlier decisions in Benedict F. Lubell, *Unilateral Palpable and Impalpable Mistake in Construction Contracts*, 16 MINN. L. REV. 137, 142-45 (1932), updated by Ernest M. Jones, *The Law of Mistaken Bids*, 48 U. CIN. L. REV. 43, 64-65 (1979).

36. The source of the "unconscionability" epithet is probably *Geremia v. Boyarsky*, 140 A. 749 (Conn. 1928), in which the plaintiff "had good reason to know before the contract was signed that there must have been a substantial omission or error in the amount of [defendant's] bid." *Id.* at 750. The court granted rescission, noting that "equity will grant relief if [the other party], when he becomes aware of the mistake, seeks to take an unconscionable advantage of it." *Id.*

to state the same conclusions in terms suggesting that the "unconscionable" result was merely that the nonmistaken party obtained the benefit of an overly one-sided bargain.³⁷ If it escaped notice that the cases in which courts granted rescission all raised problems of "genuineness of consent," the available explanations were limited to ethical considerations. For the practicing objectivist, the preferred explanation was simply that "courts feel that on ethical grounds the promisee should not be permitted to take advantage of the mistake."³⁸

This choice of an explanation for the outcomes in the mistaken-bid cases, rather than the outcomes themselves, has produced visible consequences in the expanding scope of relief for unilateral mistake. A "subjective" explanation restricts the remedy to the class of mistakes that might be said to negative "genuine assent"; it notably excludes any application to a party's mistake as to value. Once this limiting explanation was omitted, however, the mistaken-bid cases became potentially much broader authority. The same decisions could now be read to suggest that there might be relief for unilateral mistake where the resulting bargain was very unequal, or where the other party had not yet changed his position in reliance. The *Restatement (Second) of Contracts* goes a long way toward adopting both propositions, relying on the mistaken-bid cases as its primary authorities.³⁹

A further category of decisions, in which courts have been willing to grant relief for a mistaken bid despite the *absence* of knowledge (or reason to know) on the part of the other party, compounds the adverse consequences for the security of transactions.⁴⁰ The offense to classical doctrine is more pronounced, since the nonmistaken party is now denied good-faith expectations that in the former class of cases, where he knew of the mistake, he could not legitimately form. If the decisions granting relief for what is called "impalpable mistake" are considered in the "ob-

37. The decision in *Geremia*, which in context reflects a subjective theory of contract formation, quickly came to be cited for a simpler and broader proposition: "If a contract is still executory, and the parties can be put in statu quo, one party to the contract will not be permitted to obtain an unconscionable advantage merely because the mistake was unilateral." Annotation, *Unilateral Mistake as Basis of Bill in Equity to Rescind the Contract*, 59 A.L.R. 809, 815 (1929).

38. Lubell, *supra* note 35, at 143 (footnote omitted). In the same objectivist vein, see also Edwin W. Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859 (1928).

39. See RESTATEMENT (SECOND) OF CONTRACTS § 153 cmts. c & d, with the Reporter's Note (1981).

40. See, e.g., *Elsinore Union Elementary Sch. Dist. v. Kastorff*, 353 P.2d 713 (Cal. 1960); *Boise Jr. College Dist. v. Mattefs Constr. Co.*, 450 P.2d 604 (Idaho 1969); Jones, *supra* note 35 (citing cases).

jective" manner—without observing, in other words, that the contract being set aside never had the genuine assent of the mistaken party—they authorize a truly radical conjecture: that while a court must still (presumably) protect innocent *reliance*, it need not protect contractual *expectations* where to do so would produce "undue hardship" (or whatever the formula might be). The cross between Williston's objectivism and the modern concern for contractual equality thus yields the very rule that Williston had used to demonstrate, by a *reductio ad absurdum*, the unthinkable consequences of a theory of mistake based on "genuineness of consent."⁴¹

Relief for "unilateral mistake unknown to the other party" is an extreme remedy. If it is limited to cases in which the mistake is the kind that obstructs a "meeting of the minds," however, the remedy remains subject to important practical limits. Without this subjective qualification, there is no obvious reason why expectations (absent reliance) should not be disregarded whenever their fulfillment would result in undue hardship flowing from a unilateral mistake as to value—from the "asymmetric information," in other words, that permits or induces anyone to make an unfavorable bargain. Because it omits any such qualification of the nature of the unilateral mistake for which relief will be granted, the new *Restatement* implies that a unilateral mistake as to value, even if unknown to the other party, may be grounds for rescission. Some courts have followed it this far. Williston would shudder at the new doctrine of the American Law Institute, according to which the finality of transactions will yield wherever "the effect of [a] mistake is such that enforcement of the contract would be unconscionable;"⁴² but his own superstitious reluctance to acknowledge the "subjective" component of traditional mistake doctrine must be held at least partly responsible.

III. THE BRAVE NEW WORLD OF UNILATERAL MISTAKE

Because its original content is now largely forgotten, the doctrine of unilateral mistake has become peculiarly susceptible to the imposition of new meaning. The most notable propositions currently stem from two quite different sources. In Section 153 of the *Restatement (Second) of Contracts*, the American Law Institute has sought to codify the most liberal possible reading of the mistaken-bid cases, making the doctrine of

41. See again the quotation from Williston accompanying note 31 *supra*.

42. RESTATEMENT (SECOND) OF CONTRACTS § 153(a) (1981).

unilateral mistake a vehicle of judicial intervention to police the fairness of the contractual exchange.⁴³ Meanwhile, law-and-economics writers—far from rising to the defense of freedom of contract, as an outsider might naively expect—propose (by implication) even more intrusive rules to require contracting parties to disclose information relevant to a proposed transaction. It is difficult to say which approach does greater violence to the ideals of traditional contract law.

A. *Unilateral Mistake as a Guarantee of Fairness*

The suggestion that one party's mistake as to value could ever be grounds for avoiding a bargain is antithetical to the common-law conception by which a competent individual bears sole responsibility for selecting the terms on which he chooses to deal. The utter anomaly of seeking rescission on the grounds that one had made a bad bargain is one of the most characteristic presumptions—harsh or invigorating, depending on one's point of view—of the common law of obligations.⁴⁴

Recognition of "unconscionability" as an independent defense to contract liability, by the Uniform Commercial Code and the *Restatement (Second) of Contracts*, has generated an avalanche of commentary. It is less frequently noticed that the *Restatement's* formula for the availability of relief for unilateral mistake also proposes to regulate the fairness of privately negotiated bargains, including contracts whose terms are not claimed to be "unconscionable" in themselves. Section 153 ("When Mistake of One Party Makes a Contract Voidable") provides as follows:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or

(b) the other party had reason to know of the mistake or his fault caused the mistake.⁴⁵

43. See *id.* cmt. c and the accompanying Reporter's Note.

44. Compare the late Roman doctrine of *laesio enormis*, permitting a seller of real property to rescind upon a showing that the contract price was less than half the real value. See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 175 (1962). The doctrine survives in some civil law systems. See, e.g., CODE CIVIL art. 1674 (Fr.) (seller of real property may rescind if contract price is less than five-twelfths real value).

45. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). The proviso in the quoted passage,

The meaning of "unconscionable" in this section is less than clear, since if the contract were simply "unconscionable" (by the standards of Restatement § 208), the existence of a unilateral mistake would be irrelevant. In context, however, it is difficult to avoid the inference that the test of "unconscionability" in Section 153 may be satisfied simply by finding an unacceptable imbalance in the terms of the exchange, at least where the nonmistaken party has not acted in reliance.⁴⁶

This rule for unilateral mistake, and not the better-known rule of discharge for "unconscionability" pure and simple, constitutes the *Restatement's* more fundamental attack on older notions of freedom of contract. The refusal to enforce bargains that are literally "unconscionable"—bargains that any civilized legal system would recoil from enforcing—can frequently be reconciled with freedom of contract by observing the respect in which such agreements are not, in fact, the product of unconstrained negotiation. Where the "unconscionable" agreement is tainted by fraud, duress, or undue influence, it is not the product of individual volition; freedom of contract (concerned, after all, with the freedom of both parties) requires that it be denied legal effect.⁴⁷ By contrast, any extension of mistake doctrine to cover a person's mistake as to the cost or value of his end of a freely negotiated exchange strikes at the heart of the common law's insistence that, within the sphere left to private ordering, we take responsibility for the terms on which we choose to arrange our affairs.

The *Restatement's* justification of this realignment rests on the case law already discussed, notably the mistaken-bid cases. Drawing a rule from those decisions, but without acknowledging the implicit qualifica-

"if he does not bear the risk of the mistake under the rule stated in § 154," refers to the *Restatement's* identification of circumstances in which it proposes that a party be held to have assumed the risk of a mistake. One such circumstance is that in which "the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." RESTATEMENT (SECOND) OF CONTRACTS § 154(c) (1981). The unilaterally mistaken party who can avoid these findings gains access to the unconscionability doctrine of § 153(a).

46. See RESTATEMENT (SECOND) OF CONTRACTS § 153 cmts. c & d (1981). The *Restatement's* test is accurately paraphrased by a modern treatise: "Today avoidance [for unilateral mistake] is generally allowed if two conditions concur: 1) enforcement of the contract against the mistaken party would be oppressive, or, at least, result in an unconscionably unequal exchange of values and 2) rescission would impose no substantial hardship on the other." JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9-27 (3d ed. 1987) (emphasis added, citations omitted).

47. The argument that truly repugnant agreements might be denied enforcement on the basis of the traditional common-law formation defenses is suggested by Richard A. Epstein, *Unconscionability, A Critical Reappraisal*, 18 J. L. & ECON. 293 (1975).

tions that made the decisions possible at the time, Section 153 states a rule that is far broader than its purported authorities. If we fail to distinguish the nature of the mistake being made—if we are forbidden to attach any significance to the existence of “a meeting of the minds”—relief for a mistake “of which the other party had reason to know” becomes potentially available merely on a showing that the better-informed party was aware that the mistaken party was making a bad bargain.⁴⁸ And if we may go this far, it is no longer clear that awareness of the bad bargain by the other party should make any difference. The bad bargain, if it is bad enough, will be sufficient reason for avoidance.⁴⁹

Section 153 of the second *Restatement* invites these consequences, and the invitation has been readily accepted by judges who regard the fairness of the contractual exchange as an appropriate object of intervention.⁵⁰

48. In *Sheinbein v. First Boston Corp.*, 670 S.W.2d 872 (Mo. Ct. App. 1984), a dealer repeatedly offered a customer certain bonds at \$790 each. The market value of the bonds at the time of the offer was \$885. The customer eventually ordered \$250,000 in principal amount, declining a subsequent offer of a further \$250,000 at the same price. Later that day the dealer disclaimed the transaction, asserting that it had intended to offer at \$890. The trial court instructed the jury that there might be relievable mistake if “at the time plaintiff accepted the offer he knew that defendant intended to offer the debentures at a price of \$890 per debenture rather than \$790 per debenture.” *Id.* at 876. Note that this instruction, correct by traditional standards, permits relief for failure of assent known to the buyer (as in the baseball card case) but not for the seller’s unilateral mistake as to value. The court of appeals held the instruction to be reversible error. “There was no evidence on which the jury could find that the plaintiff knew, at the time he accepted the offer, that the defendant intended to offer the debentures at \$890 per debenture. . . . The jury should have been instructed that its verdict should be for the defendant if . . . the plaintiff knew or had reason to know that the offering price was not a reasonable price and resulted from a mistake by the offeror.” *Id.*

49. In *Schultz v. County of Contra Costa*, 203 Cal. Rptr. 760 (Cal. Ct. App. 1984), plaintiff was the successful bidder at a tax sale on a piece of property he later learned was “unbuildable,” being situated in a “slide area.” He obtained rescission of the executed purchase on the ground of unilateral mistake: specifically, as the appellate court put it, on the ground that he had “mistakenly evaluated the contractual exchange.” Rescission was “equitably suitable,” in the court’s view, because “enforcement of the contract would result in a substantial burden on plaintiff.” *Id.* at 764-65. The decision is noteworthy because it in no way depends on a theory of warranty, a theory that the seller had reason to know of the buyer’s mistake, or a theory of “duty to disclose.” The seller was not the government entity that declared the lot “unbuildable,” and there was (in the words of the dissent) “no evidence that the state knew or should have known of this prohibition.” *Id.* at 767.

50. Decisions making liberal use of “unilateral mistake” to avoid enforcing an unequal exchange include *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983); *Cummings v. Dusenbury*, 472 N.E.2d 575 (Ill. App. Ct. 1984); *Hamel v. Allstate Ins. Co.*, 559 A.2d 455 (N.J. Super. Ct. App. Div. 1989); cf. *McGinnis v. Cayton*, 312 S.E.2d 765, 773 (W. Va. 1984) (Harshbarger, J., concurring).

Even when relief for unilateral mistake would properly be available under the traditional, “subjective” test, the modern tendency to explain decisions in the language of unconscionability renders the older reasoning increasingly inaccessible. In *Hall v. United States*, 19 Cl. Ct. 558 (1990), the U.S. Air Force mistakenly offered at auction a jet engine fuel control that was supposed to be sent for

Broad acceptance of the *Restatement* view would work a radical alteration of American contract law at the level of first principles. Such a change would be widely welcomed. Discussing Chief Justice John Marshall's holding in *Laidlaw v. Organ*, that Organ (the buyer) was not bound to communicate his superior information to Laidlaw (the seller), George Palmer wrote in 1978 that "[t]oday, it is likely that many courts would reach the opposite conclusion; this was not fair dealing by Organ and the ethical judgment would be translated into legal terms."⁵¹ Common-law judges whose ethical sense was no less acute long thought it appropriate that the requirements of contract law be independent of the requirements of ethical conduct, but the number of judges and law professors prepared to live with that distinction appears to be diminishing.

B. *Regulating Inefficient Bargaining Behavior*

Given the conservative policy implications of much of their writing, it might casually be supposed that law-and-economics commentators would defend traditional doctrine in the area of contract law: common-law rules for a privately ordered society in which individual autonomy is recognized as a paramount value. Nothing, it seems, could be further from the truth. Law-and-economics scholars interested in contracts are typically among the most aggressive advocates of judicial intervention to improve on private bargains. It turns out that in leaving them so largely to their own devices, the common law often permits individuals (however rational) to act inefficiently. Between freedom and efficiency, law and economics chooses efficiency.

The present context offers a particularly good example: the problem of unilateral mistake as to value, or, more specifically, of an individual's right to contract on the basis of information not shared with the other party. The issue is illustrated by such dramatic paradigms as *Laidlaw v. Organ*⁵² and the Texas Gulf Sulphur episode,⁵³ in which buyers negoti-

repairs. This item (worth \$167,553) was sold for \$15 to a jet engine mechanic on active duty with the Air Force. The reported facts suggest the buyer not only knew the real value of the fuel control but knew (or had reason to know) that the Air Force intended to repair it, not sell it. The court held the sale void, but the critical facts relating to the parties' respective understandings were ignored in its opinion. On the issue of unilateral mistake, the court instead recited the *Restatement's* factors, concluding that "[t]he consequences of the mistake are so grave that enforcement of the contract would be unconscionable." *Id.* at 560.

51. 2 PALMER, *supra* note 6, § 21.3, at 556 n.18.

52. 15 U.S. (2 Wheat.) 178 (1817). The buyer in *Laidlaw* obtained word of the Treaty of Ghent

ated unusually advantageous bargains by concealing superior information from sellers without resorting to what is ordinarily considered fraud.

Since Anthony Kronman's seminal article in 1978, the law-and-economics commentary has reached an approximate consensus on the following propositions. First, the ability to profit from superior information is lost if the information must be shared; to require the disclosure of information thus removes the incentive for its acquisition. To the extent that the acquisition of information is socially beneficial (in moving goods to higher-valued uses), bargains struck on the basis of superior information must be enforced; since if the better-informed party is denied the fruits of his information, the incentive to develop it will be lost. At the same time, however, a regime of voluntary disclosure—the privilege to choose whether or not to disclose information in the context of contract negotiations—leads to inefficient behavior. Because the rewards of superior information are so great, buyer and seller may engage in a redundant search for the same information. Each fearing to be outdone by the other, the parties are likely, between them, to make investments in information gathering that exceed the socially optimal amount. Moreover, the parties will seek to acquire information that affords only a relative bargaining advantage: that is, information having only redistributive effects as between the parties, and consequently no social value whatever. It follows that any expenditure on information whose object is merely to obtain a redistributive advantage—such as paying a lower price or receiving a higher one—is inefficient from a social welfare-maximizing point of

(ending the War of 1812) a few hours before the news was generally known in New Orleans. Because the establishment of peace meant that the British blockade of the port would be lifted, publication of the news brought an immediate increase of 30 to 50% in the price of tobacco. The suit involved the validity of a contract for the purchase of 111 hogsheads of tobacco from a commission merchant who, before agreeing to sell, had asked the buyer "if there was any news which was calculated to enhance the price or value of the article." It must be inferred that the buyer managed to complete the contract without answering this question, since the case would otherwise have been a simple matter of fraud. (Whether buyer's evasion of seller's question might under the circumstances constitute misrepresentation was a question that, in the opinion of Chief Justice Marshall, should have been left to the jury. *Laidlaw* makes a cleaner paradigm if we ignore the seller's inquiry.)

53. By conducting extensive aerial surveys (at a cost of some \$3 million), Texas Gulf Sulphur identified a geological anomaly indicating the presence of extraordinary mineral deposits near Timmins, Ontario. The company paid \$18,000 (plus 10% of any profits) for mining rights in one parcel that proved to be worth an estimated \$1 billion. When the value of the rights became apparent, the owners sued to rescind the transaction, alleging that Texas Gulf's failure to disclose its information about the potential value of the land constituted misrepresentation. The suit was settled out of court. See Kronman, *supra* note 5, at 20; *Leitch Gold Mines, Ltd. v. Texas Gulf Sulphur Co.*, [1969] 1 O.R. 469, 489-90 (High Ct. of Justice 1968).

view.⁵⁴

A recent paper by Steven Shavell⁵⁵ concludes, on the basis of a formal mathematical demonstration, that a rule of law permitting parties to disclose or withhold information as they please is socially undesirable, not only where the information is without social value—such as information affecting only the price to be paid—but in many instances even when the information is socially valuable in that it tends to increase the value of the good. Shavell concludes that, for significant classes of cases, the freedom to acquire information that one may choose to disclose or withhold is an inducement to inefficient behavior, and that a legal rule compelling the mandatory disclosure of information in these cases, prior to contracting, would be socially desirable (ignoring administrative costs).⁵⁶

One may assume the complete accuracy of Shavell's formal demonstration—within its somewhat artificial limits⁵⁷—and still be left with the feeling that the law has got lost somewhere in the economics. The implication of the economics is that it would be desirable, were it feasible, to deny to contracting parties the freedom to search for whatever information they see fit, to take advantage of information fortuitously obtained, and to disclose or withhold this information as they choose. But the ability to pursue one's self interest in this fashion, regardless of the contribution to social welfare, is an element of individual liberty so fundamental that it lies happily beyond the reach of any real-world legislation. Life in a society that could enforce the perfectly efficient disclosure of information would be a totalitarian nightmare.⁵⁸ The compulsory disclosure of economic information interferes with an intensely personal form

54. The statements in the text paraphrase common themes of the works cited *supra* note 5.

55. Shavell, *supra* note 5.

56. Shavell demonstrates, more specifically, that disclosure of information by sellers should be mandatory in all cases. When information has no social value, disclosure by buyers also should be mandatory. When information has social value, however, disclosure of information acquired by buyers should be voluntary to the extent that "the increase in value of goods arising from the information buyers obtain exceeds the total cost of information to buyers." *Id.* at 3-7. Buyers' information relating merely to the distribution of gains between buyers and sellers, as in *Laidlaw v. Organ*, thus would be subject to mandatory disclosure; while buyers' information contributing to higher values, as in the purchase of mineral-bearing land by Texas Gulf Sulphur, would retain some degree of protection.

57. The most significant limitation of Shavell's model is his assumption that the opportunity to acquire information prior to sale is open either to sellers or to buyers, but not to both. *Id.* at 10. The model thus excludes the case in which both buyer and seller have the means—such as independent appraisals or research efforts—by which to develop information relevant to the transaction. But the excluded case probably accounts for the most typical situation in real-world negotiation.

58. Shavell acknowledges that "actual enforcement of disclosure rules is a nontrivial problem

of property, and disclosure requirements broad enough to achieve the efficiency goals Shavell has in view would constitute an infringement of individual autonomy far more severe than the American Law Institute's attempts to legislate fairness. It is fortunate that they are administratively inconceivable.

The arguments normally will be deployed at a less utopian level. The behavior of contracting parties might be made more efficient if, in certain cases at least—those in which the disappointed party is in a position to prove the state of the other's knowledge—it were held to be misrepresentation to withhold material information of particular kinds: information fortuitously obtained;⁵⁹ or information having merely redistributive as opposed to productive effects;⁶⁰ or information whose enforced disclosure will not reduce incentives for its generation and utilization in the first place;⁶¹ or again any information, other than information acquired by buyers that brings about a greater increase in the value of goods than its cost of acquisition.⁶² The inevitable question—addressed by none of the writers responsible for these suggestions—is whether the efficiency gains produced by any of these rules could conceivably outweigh the cost of making the necessary determinations.

If the cost of administration is added to the equation, the relative advantages of the common-law rule are quickly apparent. The traditional rule, as we have already seen, provides no relief for one contracting party's mistake (or inferior information) about *value*, unless the parties stand in some special relationship.⁶³ Claims for relief from a bad bargain (absent fraud) are rarely made and easily disposed of. By contrast, any of the proposed modifications to the ordinary privilege of withholding information of economic value would be extremely expensive to administer. Each of the suggested tests involves difficult factual issues—many of them requiring, among other things, the expert testimony of economists. The new defenses would be potentially applicable, moreover, to a very broad class of cases. If rescission or reformation were generally available

for the law," though he holds out the hope that "[a] low probability of detecting concealment . . . can sometimes be offset by a high penalty, so that enforcement might be effective." *Id.* at 32.

59. Kronman, *supra* note 5.

60. COOTER & ULEN, *supra* note 5, at 259-61.

61. TREBILCOCK, *supra* note 5.

62. Shavell, *supra* note 5.

63. While the tendency of modern cases to find increased "duties of disclosure" or simply more implied representations in certain types of transactions has complicated the picture somewhat, the ground rules for the ordinary arm's-length transaction remain well understood. *See supra* note 7.

for contracts formed on the basis of inferior information, the number of contracts giving rise to such claims would be limited only by the difficulties of proof and the expense of litigation, since the cost of sharing information (if nothing else) ensures that the information of contracting parties will in every case be asymmetric.

Benefits must therefore be weighed against costs. Adopting for convenience Michael Trebilcock's statement of "the overall efficiency or welfare objective of rules that govern cases of material nondisclosure"—namely, "facilitating the movement of resources from less to more productive uses with as few transaction costs as possible"⁶⁴—it is far from clear that any of the proposed adjustments to the duty of disclosure would constitute an improvement in welfare-maximizing terms. The freedom we enjoy at common law to do whatever we like with our information plainly facilitates the movement of resources; the economic objection is only to the costs incurred in a socially unproductive competition for information. Merely balancing administrative against information costs, however, it is doubtful that the excessive investment in information gathering could ever outweigh the cost to the legal system of determining when material information had been improperly withheld in an arm's-length contract negotiation. And the argument cannot finally be confined to costs in these categories. The simple freedom to keep one's own counsel in a private negotiation is an aspect of personal liberty that contributes to social welfare, as surely as the police-state methods needed to enforce any other rule would diminish it.

The inherent economic advantages of the traditional rule, with its narrow grounds of discharge for unilateral mistake, have been ignored in part because the rationale of the traditional rule is no longer very well understood. Kronman's article, which launched the modern investigation into the efficiencies of compulsory disclosure, began as an attempt to find an explanation for an "apparent inconsistency" in the case law of unilateral mistake:

On the one hand, there are many contract cases—generally classified under the rubric of unilateral mistake—which hold that a promisor is excused from his obligation to either perform or pay damages when he is mistaken about some important fact and his error is known (or should be known) to the other party. On the other hand, cases may also be found which state that in some circumstances one party to a contract is entitled to withhold information he knows the other party lacks. . . .

64. TREBILCOCK, *supra* note 5.

. . . [Both lines of cases] address essentially the same question: if one party to a contract knows or has reason to know that the other party is mistaken about a particular fact, does the knowledgeable party have a duty to speak up or may he remain silent and capitalize on the other party's error? The aim of this paper is to provide a theory which will explain why some contract cases impose such a duty and others do not.⁶⁵

Kronman's theory was that the common law protected information produced by conscious search, but not information fortuitously obtained. As an explanation of the decided cases, this hypothesis has not been found satisfactory. Resolving the "apparent inconsistency" requires not a new theory but an old one: the forgotten explanation in terms of "genuineness or reality of consent" explored in Part I of this Article.

To call this explanation "forgotten" is no exaggeration. The degree to which modern commentators may fail to recognize distinctions that were once the common currency of the subject can be seen in Kronman's discussion of two much-quoted (and still pertinent) illustrations from the *Restatement of Restitution*:

8. A, looking at cheap jewelry in a store which sells both very cheap and expensive jewelry, discovers what he at once recognizes as being a valuable jewel worth not less than \$100 which he correctly believes to have been placed there by mistake. He asks the clerk for the jewel and gives 10c. for it. The clerk puts the 10c. in a drawer and hands the jewel to A. The shopkeeper is entitled to restitution because the shopkeeper did not, as A knew, intend to bargain except with reference to cheap jewelry.

9. A enters a second-hand bookstore where, among books offered for sale at one dollar each, he discovers a rare book having, as A knows, a market value of not less than \$50. He hands this to the proprietor with one dollar. The proprietor, reading the name of the book and the price tag, keeps the dollar and hands the book to A. The bookdealer is not entitled to restitution since there was no mistake as to the identity of the book and both parties intended to bargain with reference to the ability of each to value the book.⁶⁶

Illustration 8 is the baseball card case, version [A]. (Note the careful distinction, in the two illustrations, between "clerk" and "proprietor.") Illustration 9 is the way the buyer in the baseball card case inevitably attempted to characterize his transaction.

The distinction between the two cases, which the Reporter of the *Restatement*, Warren A. Seavey, must have intended to be self-evident, can

65. Kronman, *supra* note 5, at 1-2.

66. RESTATEMENT OF RESTITUTION § 12 cmt. c, illus. 8 & 9 (1937).

now appear mystifying. While Kronman felt that the second example "makes economic sense," he found the first "more puzzling":

The one important factual difference between the first example and the second one is that while the latter involves a secondhand store, the former involves a store which sells new, high quality merchandise as well as inferior goods. Why should this make a difference so far as the knowledgeable party's duty to disclose is concerned? The restaters distinguish the two situations in terms of the parties' intentions to bargain. This explanation is unsatisfactory, however, since it fails to indicate why their intentions should be different in the two cases.⁶⁷

Indeed, if we fail to grasp the significance of one party's knowledge that his proposed transaction has not obtained the other's genuine consent, the distinction between the illustrations is inexplicable. No wonder so many law professors had trouble with the baseball card case.⁶⁸

CONCLUSION

The baseball card case makes a splendid example of "unilateral mistake" in contract formation because it illustrates two rules at once. If the buyer knew the card was not in fact being offered at the price accepted by the clerk, there could be no contract of sale. On the other hand, if the buyer realized that the card was actually being offered at a price equal to one percent of its value, he was, by the traditional rule, entirely free to take advantage of the seller's mistake. The explanation of these contrasting results depends on a "subjective" theory of contract; though its only "subjective" feature, in this application, is to insist that one party cannot enforce a contract to which he knows the other party did not in fact agree. While a manifest failure of mutual assent necessarily prevents contract formation, standard doctrine sees no objection to a party's freely negotiating a bad bargain, whether as a result of ill luck or inferior infor-

67. Kronman, *supra* note 5, at 31.

68. Kronman is not the only commentator to find these illustrations baffling. In the course of a highly critical review of Kronman's article, Robert Birmingham stumbles at the same point. Quoting the *Restatement's* explanation of the result in the jewel case—that "the shopkeeper did not, as A knew, intend to bargain except with reference to cheap jewelry"—Birmingham comments:

Kronman's article is in deep trouble here, but not for the *Restatement's* reason. That reason is a nonstarter today. Today's reader interprets an intention to bargain not signaled by verbal behavior as an artifact of a decision already made, not as an independent ground for decision. The trouble is that the illustration decides for the mistaken party what might as well be a case of deliberate search.

Birmingham, *supra* note 5, at 264. "Today's reader" has so thoroughly internalized Williston's objectivism that he no longer recognizes what the 1937 *Restatement of Restitution* is talking about.

mation. It is for this reason that a unilateral mistake as to value, whether or not known to the other party, will not, by traditional standards, constitute grounds for rescission.

A hundred years ago, an explanation of unilateral mistake doctrine along these lines would have been commonplace. Today it has become relatively inaccessible: not from any demonstrated inadequacy as legal theory, but rather as the result of a superstitious reluctance, earlier in this century, to ascribe any significance to "subjective" tests of contract formation. The inability to distinguish the cases offering relief for unilateral mistake in terms of their critical characteristic—the fact that the underlying mistakes were such as to obstruct "genuineness of consent" or a "meeting of the minds"—eventually undermined the former limits to the rule of discharge. As relief came to be more liberally granted, notably in the area of mistaken bids, the absence of a limiting explanation in terms of "mutual assent" left these cases as potential authority for a radically different proposition: that relief might be available where the nonmistaken party had not acted in reliance, and where the mistaken party would suffer harsh consequences from enforcement. Such is the interpretation that the second *Restatement* has attempted to place on the existing case law.

The traditional, narrow rule of discharge for unilateral mistake—with the correlative freedom to withhold information in the context of contract negotiations—holds little attraction for either of the most visible schools of modern contract theory: those who would make contracts fair, or those who would make them efficient. The common law's traditional insistence that legal and ethical standards of bargaining are independent of each other, and that the terms of a freely negotiated exchange are no concern of the courts, promoted freedom and individual responsibility. It did so at the cost of enforcing some unfair agreements, and of tolerating socially inefficient behavior by self-interested individuals. Courts faced with the new claims of "unilateral mistake" must decide whether it is worth countenancing some unequal exchanges in order to preserve an area of economic affairs in which the law leaves competent persons to look after themselves. Economists might ask not only whether rules mandating disclosure can be administratively efficient, but whether the freedom to acquire information in pursuit of private advantage is not in itself a significant source of utility.