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Wayne Barnes

Texas A&M University School of Law, wbarnes@law.tamu.edu

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THE OBJECTIVE THEORY OF CONTRACTS

*Wayne Barnes**

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I. INTRODUCTION

The objective theory of contracts provides that mutual assent to a

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contract is determined by reference to external acts and manifestations, not by evidence of subjective, internal intention.¹ Stated more simply, contract formation depends on what is communicated, not on what is merely thought.² Thus, modern objective theory provides that “objective manifestations of intent of [a] party should generally be viewed from the vantage point of a reasonable person in the position of the other party.”³ The objective theory of contract formation is overwhelmingly followed in common law jurisdictions.⁴ On one level, objective theory is certainly a matter of evidentiary pragmatism.⁵ On another level, it vindicates many of the philosophical underpinnings of contract law in a free society, such as the principle of fairness, the protection against reliance, freedom of contract, and personal autonomy.⁶

Despite the clear dominance and importance of the objective theory of contracts, certain doctrines in contract law pertaining to contract formation⁷ persist even though the doctrines are clearly contrary to objective theory and its policy goals. Chief among these doctrines are the following: (1) the “death of offeror” rule, which provides that a revocable offer is terminated upon the offeror’s death,⁸ (2) the “mailbox

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 309 (Dover Publ’ns, Inc. 1991) (1881) (“The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”).

2. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 129–30 (2000) (describing history of development of objective theory).

3. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.2, at 27 (5th ed. 2003) (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760–61 (2d Cir. 1946) (Frank, J., concurring)).

4. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000).

5. *Id.* at 428–29. Professor Perillo states that the objective theory became permanently dominant when most jurisdictions changed the rules of procedure to allow litigants to testify for themselves. *Id.*

6. See PERILLO, *supra* note 3, § 1.4, at 6–13.

7. This Article is concerned solely with contract formation—that is, whether or not a contract has ostensibly been formed in the first place by the appearance of mutual assent. It is not concerned with various defenses to the enforceability of a contract which has otherwise been formed, such as mistake, misrepresentation, and duress. These defenses appropriately rely on an examination into the parties’ subjective understandings. See RESTATEMENT (SECOND) OF CONTRACTS §§ 151–76 (1981); see also Perillo, *supra* note 4, at 428 (“Subjective approaches did . . . transform the availability of relief for mistake, duress, and other grounds of avoidance.”); 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 4:1, at 335 (4th ed. 2007) (“By contrast, courts exercising equitable jurisdiction have not shown the same indifference to the undisclosed intention of the parties as have courts of law; but insofar as the concern is with the rules of law governing the formation of contracts, not with whether contracts so formed are or might be subject to reformation or rescission in equity, that distinction is not important.”).

8. See RESTATEMENT (SECOND) OF CONTRACTS § 48. Actually, the rule as formulated by the Restatement provides that death of either the offeror or the offeree terminates the offer. *Id.*

rule,” which provides that certain contracts are formed at the moment an acceptance is dispatched,⁹ and (3) the finding of consumer assent to objectionable but unread terms in standard form contracts.¹⁰

Each of these doctrines is in some way inconsistent with the objective theory of contracts, especially in their implication of individual autonomy and reliance concerns. The death of offeror rule terminates an outstanding offer without any communication to the offeree and, indeed, without any opportunity for the offeror’s estate to appropriate the benefits of the contract proposed by the deceased offeror.¹¹ The mailbox rule allows formation of a contract even though the offeror is unaware of the contract’s formation.¹² And finally, consumer assent to standard form contracts can be problematic if the consumer would object to one or more terms in the contract, the merchant knows this, and the merchant also knows—and even relies on the fact that—the consumer will not discover the objectionable term because the consumer will not read the form.¹³

These doctrines should be reassessed and reevaluated in light of modern objective theory and in light of their historical context. Should this analysis reveal that the bases for these doctrines are no longer compelling, then the rules should be revised to reflect the autonomy concerns inherent in the objective theory of contract formation. Part II of this Article discusses the objective theory of contracts, its history, and the underlying goals it seeks to achieve.¹⁴ Part III discusses the “death of offeror” rule, its inconsistency with objective theory, and how the doctrine should be reformed so as to comport with objective theory.¹⁵ Part IV undertakes the same analysis with respect to the mailbox rule,¹⁶ and Part V does the same for consumer assent to standard form contracts.¹⁷ Part VI offers a brief conclusion, culminating with a plea for the law on contract formation to be more fully harmonized with the objective theory of contracts.¹⁸

9. See RESTATEMENT (SECOND) OF CONTRACTS § 63(a); *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818).

10. See RESTATEMENT (SECOND) OF CONTRACTS § 211; JOSEPH M. PERILLO, 7 CORBIN ON CONTRACTS § 29.8, at 402 (rev. ed. 2002) (describing the traditional “duty to read” rule regarding standard form contracts and its relationship to the objective theory of contracts).

11. See *infra* notes 81–101 and accompanying text.

12. See *infra* notes 116–144 and accompanying text.

13. See *infra* notes 160–187 and accompanying text.

14. See *infra* notes 19–80 and accompanying text.

15. See *infra* notes 81–115 and accompanying text.

16. See *infra* notes 116–159 and accompanying text.

17. See *infra* notes 160–198 and accompanying text.

18. See *infra* notes 199–201 and accompanying text.

II. THE OBJECTIVE THEORY OF CONTRACTS

A. History of the Objective Theory of Contracts

Contracting is quintessentially a consensual activity.¹⁹ One commonly cited definition of contract is a “legally enforceable agreement.”²⁰ Agreement is defined by the Restatement as “a manifestation of mutual assent on the part of two or more persons.”²¹ The classical mechanisms for determining mutual assent are the offer and acceptance.²² However, these mechanisms are simply means to an end—determining whether the parties both agreed on the same thing. That inquiry is at the heart of contract law.

The history of contract law reveals two ways of analyzing mutual assent: the objective theory based on what the parties communicated, and the subjective theory based on what the parties thought.²³ Of course, applying either of these two theories, in most contracts, leads to a singular result, namely mutual assent. Nevertheless, courts and commentators have struggled philosophically throughout the development of contract doctrine to determine the proper approach to determining assent.²⁴

19. See generally Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

20. PERILLO, *supra* note 3, § 1.1, at 2.

21. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

22. *Id.* §§ 17–70.

23. See *Newman v. Schiff*, 778 F.2d 460, 464 (8th Cir. 1985) (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 180–88 (1977); Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919); *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760 (2d Cir. 1946) (Frank, J., concurring)).

24. *Newman*, 778 F.2d at 464; PERILLO, *supra* note 3, § 2.2, at 26–27 (“A debate has raged as to whether the assent of the parties should be actual mental assent so that there is a ‘meeting of the minds’ or whether assent should be determined solely from objective manifestations of intent—namely what a party says and does rather than what a party subjectively intends or believes or assumes.” (footnote omitted)); *Ricketts*, 153 F.2d at 760–61 (Frank, J., concurring) (“In the early days of this century a struggle went on between the respective proponents of two theories of contracts, (a) the ‘actual intent’ theory—or ‘meeting of the minds’ or ‘will’ theory—and (b) the so-called ‘objective’ theory.”); 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.6, at 208 (3d ed. 2004) (“This question provoked one of the most significant doctrinal struggles in the development of contract law, that between the subjective and objective theories.”); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 30, at 62 (4th ed. 2001) (“[A] great deal of controversy was spawned over the question of whether the actual mental assent (subjective) of the parties was required, or whether the *expression* or *manifestation* of that assent (objective) would control regardless of any subjective intention.”); Herman Oliphant, *The Duration and Termination of an Offer*, 18 MICH. L. REV. 201, 201 (1920) (“[P]rofessor Williston has recently pointed out the change which the law of the formation of simple contracts underwent during the first century of its development. The change is fundamental. Originally the courts thought of a simple contract as involving an actual concurrence of the minds of the parties. Gradually

At one end of the spectrum is the subjective approach, requiring a "meeting of the minds." This approach, now mostly defunct, focused on the actual, literal intentions of the parties.²⁵ "The subjectivists looked to actual assent. Both parties had to actually assent to an agreement for there to be a contract."²⁶ Courts used outward manifestations of intent merely as evidence of the inner thoughts of the contracting party.²⁷

At the other end of the spectrum is the objective approach. This approach analyzes the outward appearance, or manifestation, of the parties' intention. Judge Learned Hand wrote one of the most memorable descriptions of objective theory:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.²⁸

Similarly, in his famous lectures set forth in *The Common Law*, Oliver Wendell Holmes, Jr. stated, "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."²⁹ Similarly, Dean Christopher Columbus Langdell observed, "In truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the

this conception was supplanted by the notion that the objective and not the subjective state of mind of the parties is controlling." (footnote omitted) (citing Williston, *supra* note 23)).

25. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 898 (1992) ("A 'will theory' traces the obligatory nature of contracts to the fact that parties have subjectively chosen to assume an obligation. According to this conception of consent, when one does not subjectively consent one has not 'really' consented." (footnote omitted)).

26. *Newman*, 778 F.2d at 464 (footnote omitted) (citing HORWITZ, *supra* note 23, at 180-88; Williston, *supra* note 23; *Ricketts*, 153 F.2d at 760 (Frank, J., concurring)). As Professor Farnsworth states in his treatise:

The subjectivists looked to the actual or subjective intentions of the parties. The subjectivists did not go so far as to advocate that subjective assent alone was *sufficient* to make a contract. Even under the subjective theory there had to be some manifestation of assent. But actual assent to the agreement on the part of both parties was *necessary*, and without it there could be no contract. In the much-abused metaphor, there had to be a "meeting of the minds."

1 FARNSWORTH, *supra* note 24, § 3.6, at 208-09 (footnote omitted).

27. *Newman*, 778 F.2d at 464.

28. *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

29. HOLMES, *supra* note 1, at 309.

required physical act has been done, only a physical act can undo it.”³⁰ More recently, Judge Frank Easterbrook has observed that “‘intent’ does not invite a tour through [the plaintiff’s] cranium, with [the plaintiff] as the guide.”³¹

Ultimately, objective theory has prevailed as the unifying principle governing the formation of contracts.³² Many historical accounts suggest that early contract law focused on the subjective approach before courts finally settled on an objective approach.³³ However, Professor Perillo suggests that, actually, the objective theory has always dominated contract doctrine in spite of much rhetoric reflecting the theoretical ideal of actual subjective unanimity of assent.³⁴ The subjective rhetoric peaked in the mid-nineteenth century before giving way to objective approaches.³⁵ Perillo attributes this final shift to objective theory, in part, to the mid-nineteenth century change in the rules of evidence to allow litigants to testify for themselves.³⁶

30. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 244 (2d ed. 1880).

31. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987).

32. *Newman*, 778 F.2d at 465 (“By the end of the nineteenth century the objective approach to the mutual assent requirement had become predominant, and courts continue to use it today.” (citing E. ALLAN FARNSWORTH, CONTRACTS § 3.6, at 114 (1982))); *Ricketts v. Pa. R.R.*, 153 F.2d 757, 761–62 (2d Cir. 1946) (Frank, J., concurring) (“At any rate, the sponsors of complete ‘objectivity’ in contracts largely won out in the wider generalizations of the Restatement of Contracts and in some judicial pronouncements.” (footnotes omitted) (citing SAMUEL WILLISTON, CONTRACTS § 35 (rev. ed. 1936); RESTATEMENT OF SECURITY §§ 70, 71, 503 (1941); *Hotchkiss*, 200 F. at 293)). In his treatise on contract law, Professor Murray states the resolution in favor of objective theory as follows:

The controversy has been resolved. Contract law abandoned the theory of subjective intention as unworkable. A legion of cases support the view that the outward manifestations of the parties—their expressions—will be viewed as the exclusive evidence of the parties’ intentions rather than assertions of their subjective intention. . . . There can be no doubt . . . that the objective theory is clearly established throughout the country.

MURRAY, *supra* note 24, § 30, at 63–64 (citations omitted).

33. Perillo, *supra* note 4, at 427–29 (citing LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 87 (1965); HORWITZ, *supra* note 23; GRANT GILMORE, THE DEATH OF CONTRACT 12 (1974)). Perillo stated that he was sometimes stunned by generalizations such as this one: “A standard history of contract doctrine represents that, from the sixteenth to the early nineteenth century, contract formation depended upon a subjective ‘meeting of the minds.’” Perillo, *supra* note 4, at 428 n.11 (alteration in original) (quoting Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1042 (1985)).

34. Perillo, *supra* note 4, at 428.

35. *Id.*

36. PERILLO, *supra* note 3, § 2.2, at 27. Professor Perillo has noted that, historically, courts have used three different approaches to contractual intent. First is the “medieval” objective approach, which is purely objective and does not take the individual knowledge of the other party into account at all. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 628 (2002) (citing Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 451 (2000)). The second approach is a purely subjective one, not taking into account any objective viewpoint. *Id.* The third approach is the modern one, which is a modified objective approach,

B. Definition of Objective Theory

As previously stated, objective theory determines mutual assent by evaluating external conduct. Thus, subjective, secretly held intent contrary to the outward manifestations of a party is, under the objective theory, irrelevant to contract formation.³⁷ As Holmes stated in *The Common Law*, “[T]he making of a contract does not depend on the state of the parties’ minds, it depends on their overt acts.”³⁸ However, modern approaches to objective theory have become more flexible by taking into account the superior knowledge of the person to whom the manifestations are made. Thus, one modern formulation of objective theory is that “[a] party’s intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean.”³⁹ This definition retains the attributes of classical objective theory by viewing assent from the vantage point of the “reasonable person.”⁴⁰ But the definition improves upon “pure” external objective theory, and answers many of its critics, by taking into account some subjectivity and expressly incorporating the vantage point of someone “in the position of” the actual recipient of the manifestation.

A recurring example of reconciling external manifestations and contrary subjective knowledge is the party who professes to have “only been joking” when making otherwise contractually operative manifestations of assent. Objective theory rejects this argument unless the other party knew or reasonably should have known of this actual intent, that is, of the joke.⁴¹ *Lucy v. Zehmer* is an illustrative case.⁴² In *Lucy*, two parties discussed the sale of real estate.⁴³ Lucy offered to buy it, and his offer was, no one would dispute, serious.⁴⁴ Zehmer externally acted like he seriously intended to sell the property, but he was

which also takes into account any superior knowledge held by the other party. *Id.* at 629.

37. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1266 & n.16 (1993) (“In the formation of contracts it was long ago settled that secret intent was immaterial; only overt acts being considered in the determination of such mutual assent as that branch of law requires.” (quoting 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 26 (1920))).

38. HOLMES, *supra* note 1, at 307.

39. PERILLO, *supra* note 3, § 2.2, at 28.

40. See *Ricketts v. Pa. R.R.*, 153 F.2d 757, 761 (2d Cir. 1946) (Frank, J., concurring) (“The objectivists transferred from the field of torts that stubborn anti-subjectivist, the ‘reasonable man’ . . .”).

41. See PERILLO, *supra* note 3, § 2.3, at 28–29.

42. 84 S.E.2d 516 (Va. 1954).

43. *Id.* at 517–19.

44. *Id.* at 518.

concealing the fact that he never intended to sell the property.⁴⁵ Zehmer testified at trial that he was only “needling” Lucy because he did not think Lucy could afford the land.⁴⁶ The court determined that the contract was binding because a reasonable person in Lucy’s position would have believed Zehmer genuinely intended to sell.⁴⁷ That is, the court held that Lucy was entitled to rely on what he reasonably thought Zehmer meant when Zehmer outwardly agreed to sell the property.⁴⁸ The holding is entirely consistent with the objective theory of contracts.⁴⁹

Leonard v. Pepsico, Inc. provides another example of a court using the objective theory reasoning.⁵⁰ In *Leonard*, Pepsi aired a commercial explaining its “Pepsi Points” system whereby consumers could obtain “Pepsi Points” when they bought Pepsi products and could redeem those points for merchandise.⁵¹ The commercial highlighted available merchandise, including sunglasses (175 points), a leather jacket (1,450 points), and a military Harrier jet (7,000,000 points).⁵² The commercial was obviously designed to be humorous, insofar as the availability of the Harrier jet was concerned.⁵³ However, Leonard attempted to accept Pepsi’s alleged “offer” of a Harrier jet in return for 7,000,000 Pepsi points.⁵⁴ The court rejected Leonard’s claim that a contract had been formed.⁵⁵ Instead, the court reasoned in detail why the commercial was a farce, and further why it would be perceived as such by a reasonable person.⁵⁶ Therefore, under objective theory, the court ruled that no

45. *Id.* at 518–19.

46. *Id.* at 519–20.

47. *Id.* at 521–22.

48. *Id.*

49. The testimony also indicated that both Lucy and Zehmer had been drinking before and during the negotiation. *Id.* at 518–20. However, the court found that both parties nevertheless comprehended the meaning of their actions and thus possessed sufficient capacity to contract. *Id.* at 521–22.

50. 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000).

51. *Id.* at 118–19.

52. *Id.*

53. *Id.* at 120.

54. *Id.* at 119. Leonard did not actually drink the millions of Pepsis required to obtain the points. *Id.* Rather, he discovered that Pepsi would sell the points for 10 cents each, and therefore he submitted a check for approximately \$700,000, to buy the points and thereby redeem a Harrier jet. *Id.*

55. *Id.* at 127–30.

56. *Id.* In a wonderful part of the opinion, the court said that

Plaintiff’s insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, “Humor can be dissected, as a frog can, but the thing dies in the process”

Id. at 128 (alteration in original) (quoting GERALD R. FORD, HUMOR AND THE PRESIDENCY 23 (1987)).

reasonable person would think Pepsi had the intent to be contractually bound to convey a Harrier jet in exchange for Pepsi points.⁵⁷

Lucy and Leonard nicely illustrate the gist of the objective theory of contracts—promisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise. This is the bedrock principle in the modern analysis of mutual assent to contracts.

C. Policies Served by Objective Theory

1. Evidentiary Concerns

Because the remainder of this Article discusses needed changes in certain doctrines on the basis of their inconsistency with the objective theory of contracts, some exploration of the underlying policies and rationales of the objective theory is warranted. First, as mentioned previously, Professor Perillo noted the evidentiary pragmatism of using the objective theory of contracts after the rules were generally changed to allow litigants to testify on their behalf.⁵⁸ Objective theory thus alleviated the concern that litigants would misrepresent their subjective mental intent while under oath because evidence of such subjective intent was no longer substantively relevant to the issue of contract formation.

Of course, tangible evidence of mutual assent has always been needed. Absent telepathic powers, humans can only communicate through outward manifestations.⁵⁹ Thus, “Courts [have] always taken the pragmatic view that unmanifested intention could not be the basis for making or accepting an offer.”⁶⁰ A mental determination to make or accept an offer, which is not revealed to the other party, is inoperative.⁶¹ Mere internal desire to make an offer, or to accept one, has never been

57. *Id.* at 127–30.

58. See PERILLO, *supra* note 3, § 2.2, at 27.

59. See THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS, AS APPLIED BY COURTS OF LAW 14 (1874) (“There must necessarily be some medium of communication, by which the ‘union of minds’ may be ascertained and manifested. Among men, this medium is language, symbolical, oral, or written. A proposal is made by one party, and is acceded to by the other, in some kind of language mutually intelligible; and this is mutual assent. Persons who are deaf and dumb contract only by symbolical or written language. The language of contracts at auction is often wholly symbolical. A nod or wink by one party, and a blow of a hammer given by the other, evince mutual assent.”).

60. MURRAY, *supra* note 24, § 30, at 62.

61. LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 9, at 9 (2d ed. 1965).

held sufficient. "Any other rule would be absurd."⁶²

2. Reliance and Economic Concerns

Reliance concerns also constitute a key policy rationale for objective theory. That is, "Proponents of the reliance theory of contracts profess to see the foundation of contract law not in the will of the promisor to be bound but in the expectations engendered by, and the promisee's consequent reliance upon, the promise."⁶³ A difficult situation arises when an internal intent differs from an externally manifested intent. Objective theory imports significance only to the external manifestation, not the purely internal intent. As Professor Murray illustrates:

If A makes an offer to which B manifests assent, may A later say, "I'm sorry, but we have no contract since I changed my mind a moment before you announced your acceptance?" The possible hardship to one who had relied upon what had been expressed, only to discover that he had built his house of expectations upon the shifting sands of subjective intention, was unacceptable. Under that analysis, no system of contract law could ever prove workable since it would be impossible to prove the subjective intention of either party at any time.⁶⁴

As Professor Murray states, no other form of contract law would be workable.⁶⁵ His rationale relates to reliance by parties on the manifestations of others so as to facilitate a system of contract law that in turn facilitates exchanges of value in an economic system.⁶⁶ In fact, this rationale is closely related to the requirement of consideration for an enforceable contract since consideration involves reciprocal inducement of promises.⁶⁷ "The objective theory is strongly supported by those who place the basis of contract law upon the promisee's justified reliance upon a promise or upon the needs of society and trade. An objective test

62. MURRAY, *supra* note 24, § 30, at 62.

63. PERILLO, *supra* note 3, § 1.4(d), at 9; *see also* WILLISTON & LORD, *supra* note 7, § 4:1, at 334-35 ("[T]he fundamental basis of contract in the common law is reliance on an outward act (that is, a promise), as may be seen by the early development of the law of consideration as compared with that of mutual assent.").

64. MURRAY, *supra* note 24, § 30, at 62.

65. *Id.*

66. *See* Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368 (1921) ("[T]he fundamental idea on which the action of assumpsit and the development of simple contracts rested, was that reliance on a promise—the reliance being induced by the promisor's request of an act or counter-promise of the other party—caused an obligation to arise.").

67. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

is believed to protect the 'fundamental principle of the security of business transactions.'"⁶⁸ Hence, in a very real sense, objective theory is necessary for a workable system of commerce and economic exchange because it forms contractual liability based on the external manifestations that parties may predictably rely upon.⁶⁹

3. Freedom of Contract and Private Autonomy

Contract law is, above all else, a consensual endeavor.⁷⁰ Parties are generally free to contract on whatever terms they wish, whenever they wish.⁷¹ By constructing a system of contract enforcement backed by the coercive powers of the state, the state has opted to allow parties the freedom and power to order and regulate their own economic affairs.⁷² "By giving effect to the parties' intentions, the law of contracts is based on respect for party autonomy."⁷³ Personal autonomy and freedom are the hallmarks of the Anglo-American common law of contracts, and "[c]onsent is the human vehicle for exercising freedom or autonomy."⁷⁴

The objective theory of contracts furthers the ideal of individual autonomy. Limiting contract terms to what is externally manifested gives promisees much more control over their own affairs. When the promisee is entitled to rely on gestures that can be objectively verified—versus having to discern the promisor's internal cognition, which may

68. Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 111–12 (2005) (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 25 (2d ed. 1977)).

69. See *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) ("[I]f intent were wholly subjective . . . no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business."); *Ricketts v. Pa. R.R.*, 153 F.2d 757, 761 n.2 (2d Cir. 1946) (Frank, J., concurring) ("The 'actual intent' theory, said the objectivists, being 'subjective' and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the 'objective' standard as a necessary adjunct of a 'free enterprise' economic system.").

70. See generally Barnett, *supra* note 19.

71. See Williston, *supra* note 66, at 373 ("As theories of individual freedom thus seemed to require that no obligations or defences to obligations should be allowed unless willed by the parties, so on the other hand the same theories led to opposition to restrictions being placed on the kind of contracts which they in fact did will.").

72. PERILLO, *supra* note 3, § 1.4(c), at 8 ("[I]nsofar as the law of contract places the coercions of the legal order behind the terms of a contract settled by private parties, the legal order may and indeed should set socially approved limits to the support which it gives to the terms which one party is in a position to impose on the other." (alteration in original) (quoting JULIUS STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 253 (1966))).

73. Perillo, *supra* note 4, at 427.

74. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1111 (2006); see also Kennedy, *supra* note 2, at 131 (citing Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941)).

vary from what is externally manifested—the promisee can better process information and order affairs accordingly.⁷⁵ The promisee's affairs can be planned based on what is spoken or written, communications that can also be subsequently referenced when questions regarding performance and obligation arise. Subjective, internal equivocations or doubts are of no consequence to the parties' contractual affairs and thus cannot create havoc in the parties' reasonable expectations. Thus, parties have greater autonomy and control over their own affairs when the objective theory of contracts is followed.

The objective theory of contracts also furthers the ideals of freedom of contract and personal autonomy by limiting the effectiveness of manifestations to gestures known to the other party. Recall that the modern definition of the objective theory of contracts is that "[a] party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean."⁷⁶ Not only does this definition consider to the substantive content of the external manifestation as determinative of whether a contract exists, but it also considers how that manifestation is perceived by the "other party."⁷⁷

The "other party perspective" of the objective theory formulation has, however, another aspect that may be overlooked at first glance. This other aspect is, simply, that the manifestation must be actually received in the first place for the other party's superior knowledge to be overlaid onto the content of the manifestation. Unless the external manifestation of assent is actually received by the other party, a court cannot determine what the other party (or a reasonable person in the party's position) would understand the manifestation to mean. Note that such delivery and receipt of communication is also inherent in the act of promising.⁷⁸ "The very idea of a promise necessarily involves its communication to the promisee."⁷⁹ Absent receipt of the manifestation, any discussion of whether the two parties have come to a position of mutual assent is premature or even moot.

The objective theory's premise of the other party's receipt of the manifestation squarely furthers the ideals of personal autonomy and freedom of contract. The process of contracting is not purely consensual

75. See *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989).

76. PERILLO, *supra* note 3, § 2.2, at 28.

77. *Id.*

78. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."); see also *id.* § 50(3) ("Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.").

79. SIMPSON, *supra* note 61, § 9, at 9.

if the parties are not fully aware of all external actions that may empower or bind them to a contract. The parties obviously cannot be aware of external manifestations unless they receive them or otherwise learn of their existence. By limiting operative manifestations to those that are received and known by the parties to the negotiation, individuals are empowered with the increased ability to order their own affairs. This serves the principle of freedom of contracts, and helps to explain why the objective theory has “predominated in the common law of contracts since time immemorial.”⁸⁰

III. THE “DEATH OF OFFEROR” RULE

A. *The Rule, Its History, and Its Inconsistency with Objective Theory*

If the offeror dies before the offer has been accepted by the offeree, the general rule is that the offer is terminated and the offeree no longer has the power of acceptance.⁸¹ The applicable Restatement section provides: “An offeree’s power of acceptance is terminated when the . . . offeror dies or is deprived of legal capacity to enter into the proposed contract.”⁸² The rule’s primary reason likely was the prevailing sentiment that one “cannot contract with a dead man.”⁸³ The rule’s origins certainly appear to pre-date the founding of the American Republic, going back to the French civil law, and even probably to

80. Perillo, *supra* note 4, at 428.

81. MURRAY, *supra* note 24, § 42(E) at 124; PERILLO, *supra* note 3, § 2.20(c), at 92–93; Oliphant, *supra* note 24, at 209; Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 198 (1917).

82. RESTATEMENT (SECOND) OF CONTRACTS § 48. Section 48 also provides that the offer is terminated when the offeree dies. *Id.* This situation does not necessarily implicate the same questions of objective theory and contract formation. Professor Ricks has made a similar conclusion:

Death of offeree cases differ from death of offeror cases both factually and theoretically. The death of offeree cases are thought to rest on the quite reasonable notion that the offer is personal to the offeree, and not assignable, so that the death of the offeree leaves no one left to accept the offer. Of course, difficulties with this rationale exist. The rationale might over-emphasize the “personalness” of the offer to the offeree. Moreover, an agent whose agency was coupled with an interest could accept on the offeree’s behalf, even though the offeree had died. This brief discussion proves that the policies animating the results in cases of death of the offeree differ from those animating cases involving death of the offeror.

Val D. Ricks, *The Death of Offers*, 79 IND. L.J. 667, 672–73 n.14 (2004) (citations omitted).

83. Corbin, *supra* note 81, at 198; Oliphant, *supra* note 24, at 210 (“The courts say that the reason the offer is terminated by the death of the offerer is obvious. A contract cannot be made with a dead man.”).

Roman law.⁸⁴

For all of the rule's long-settled nature and origins, it is unquestionably inconsistent with the objective theory, and "there is grave doubt whether this rule is desirable."⁸⁵ The drafters of the Restatement stated that the rule is "a relic of the obsolete view that a contract requires a 'meeting of minds,' and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent."⁸⁶ This is the sentiment of most commentators with regard to an offeror's death that is unknown by the offeree, though most think that the rule is sensible when the offeree is aware of the death before accepting.⁸⁷

The reason that the rule is inconsistent with objective theory is fairly straightforward. Assume that A makes an offer to B. Without B's knowledge, A dies. Does B still have the power of acceptance? Not under the subjective theory; once A died, it was no longer possible for A and B to both have a concurrent, subjective intent to enter into the contract since A's intent perished with his life.⁸⁸ However, under the objective theory, B undoubtedly should retain the power of acceptance. A's prior manifestation of intent to enter into the contract—the offer—has not been revoked in any communication directed toward B. "One to whom an offer is made has a right to assume that it remains open according to its terms until he has actual notice to the contrary."⁸⁹ To protect B's expectation, B should continue to have the power of acceptance until B receives communication or obtains knowledge that A

84. Professor Ricks pinpoints the first mention of the rule in American caselaw to *Mactier's Administrators v. Frith*, in 1830. Ricks, *supra* note 82, at 673 (citing *Mactier's Adm'rs v. Frith*, 6 Wend. 103 (N.Y. 1830)). *Mactier's* cited the French commentator Robert Joseph Pothier for the rule. *Id.* (citing ROBERT JOSEPH POTHIER, *TRAITÉ DU CONTRAT DE VENTE* (1806)). Professor Ricks, after an exhaustive tracking down of the origins of the rule, concludes that "[t]he dying offer rule appears to be a rather textbook example of the kind of borrowing from Roman, natural law, and medieval philosophy described by James Gordley." *Id.* at 674 n.23 (citing JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991)).

85. MURRAY, *supra* note 24, § 42(E), at 124.

86. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a.

87. See PERILLO, *supra* note 3, § 2.20(c), at 93 ("The majority view is a frequently criticized relic of the subjective theory. It does not conform to the objective theory because the offeree should be charged only with what the offeree knows or should know of the offeror's situation.").

88. Professor Ricks, in a fascinating part of his article, actually challenges this conventional thinking, noting that, as a purely factual matter, no one can say for sure whether A's soul—and thus his will—continues or not after physical death, and in the event that it does, whether it would be concerned with matters such as contracts and subjectively intending to carry them out. Ricks, *supra* note 82, at 675–76. Professor Ricks concedes the obvious evidentiary difficulties, and I do not address them further here.

89. HOLMES, *supra* note 1, at 306–07.

may no longer wish to enter into the contract.⁹⁰

Objections to this conclusion should be addressed. One criticism is that A does not subjectively intend to enter into the contract. But as illustrated previously, under the now-dominant objective theory of contracts, subjective intention is irrelevant, and the lack thereof should not prohibit the formation of a contract.⁹¹ Another criticism is that no one is left for B to contract with—A is a dead man. But this objection is not compelling because an entity succeeds A—A's estate.⁹² As Professor Corbin has observed, "the law has no difficulty . . . in creating legal relations with the dead man's personal representative."⁹³ Thus, under existing contract law, if B accepts moments before A dies, a binding contract is formed, and A's subsequent death does not "undo" the contract.⁹⁴ Stretched to its extreme, this could mean that a few seconds difference between the acceptance and the offeror's death is all that stands between a fully formed contract and a terminated offer. And if a dead person's estate can be held to fully binding contracts, then why should the estate not be held to the powers of acceptance created by their

90. Professor Corbin, in his influential treatise on contracts, stated this about the rule:

It is very generally said that the death of the offeror terminates the offeree's power of acceptance even though the offeree has no knowledge of such death. Such general statements arose out of the earlier notion that a contract cannot be made without an actual meeting of minds at a single moment of time, a notion that has long been abandoned. The rule has also been supposed to follow by some logical necessity from the dictum that it takes two persons to make a contract. It is not contrary to that dictum to deny that death terminates power to accept; the offer was made by a living man and is accepted by another living man.

1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 54, at 227–28 (1963).

91. Ricks, *supra* note 82, at 676–77 (citing RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a (1981)); 1 CORBIN, *supra* note 90, § 54, at 227 ("Such general statements arose out of the earlier notion that a contract cannot be made without an actual meeting of minds at a single moment of time, a notion that has long been abandoned."); E. ALLAN FARNSWORTH, CONTRACTS § 3.18 (3d ed. 1999); WILLISTON & LORD, *supra* note 7, § 5.19; MURRAY, *supra* note 24, § 42(E); PERILLO, *supra* note 3, § 2.34; Oliphant, *supra* note 24, at 210 ("But no concurrence of wills is necessary."); W.J. Wagner, *Some Problems of Revocation and Termination of Offers*, 38 NOTRE DAME LAW. 138, 152 (1963); *Chain v. Wilhelm*, 84 F.2d 138, 140 (4th Cir. 1936) ("This rule has been criticized on the ground that under the modern view of the formation of contracts, it is not the actual meeting of the minds of the contracting parties that is the determining factor, but rather the apparent state of mind of the parties embodied in an expression of mutual consent; so that the acceptance by an offeree of an offer, which is apparently still open, should result in an enforceable contract notwithstanding the prior death of the offeror unknown to the offeree."), *rev'd on other grounds*, 300 U.S. 31 (1937); *New Headley Tobacco Warehouse Co. v. Gentry's Ex'r*, 212 S.W.2d 325, 327 (Ky. Ct. App. 1948) (same as *Chain*).

92. See 33 C.J.S. *Executors and Administrators* § 3 (2007) ("The estate of a deceased person is not an entity known to the law, and is not a natural or an artificial person, but is merely a name to indicate the sum total of assets and liabilities of a decedent." (footnotes omitted)).

93. Corbin, *supra* note 81, at 198.

94. See PERILLO, *supra* note 3, § 2.20(c), at 93 ("If B accepts before A dies, there is a contract . . .").

offers? Again, absent the explanation of outmoded subjective theory, no particularly persuasive explanation exists, leading Corbin to state that there is no "compelling necessity for [the rule's] existence."⁹⁵

Furthermore, certain offers do survive the death of the offeror: irrevocable offers. In general, unless consideration was paid for an option contract to make the offer irrevocable for a stated period of time,⁹⁶ or unless the option is irrevocable for any other reason,⁹⁷ all offers are generally revocable by the offeror until the time of acceptance. But if an offeree pays consideration for an option, then death will not terminate the offer. So, if A makes an offer to B, and A agrees to hold the offer open for one year in exchange for B's paying A \$100 (or even \$1) for this option (period of irrevocability), A's death would not prevent B from enjoying the right to accept the underlying offer for one year. If B accepts after A's death, a contract would be formed with A, the deceased.

That the law already allows option contracts to be consummated with dead people, as well as binding contracts to continue in force with dead people, cuts against any argument that the "dying offer" rule is necessary. A question may arise, however, if the contract cannot be performed because of the death of the offeror. But the law already has a remedy for this problem, in the form of the doctrine of impracticability. Restatement section 261 provides the general rule of impracticability:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.⁹⁸

The very next section of the Restatement makes death one such consideration: "If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes

95. Corbin, *supra* note 81, at 198.

96. RESTATEMENT (SECOND) OF CONTRACTS § 37 ("Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.").

97. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 45(1) ("Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it."); U.C.C. § 2-205 (2003) ("An offer by a merchant to buy or sell goods in a signed record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may the period of irrevocability exceed three months.").

98. RESTATEMENT (SECOND) OF CONTRACTS § 261.

performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.”⁹⁹

The import of the impracticability doctrine in this context is clear. If a contract is formed and one of the parties dies, then the contract is voidable if the decedent’s continued survival was a basic assumption of the parties. For example, say that A offers to provide B with personal tutoring sessions in math. B accepts and A dies. A would be discharged under the impracticability doctrine because A’s survival is necessary for A to do the tutoring. But note that not all contracts are necessarily voidable upon the death of a party. For instance, contracts in which the primary obligation is the payment of money would not generally be voidable because the surviving party can make a claim on the assets of the estate. The same would be true of an obligation to convey personal or real property. The estate is empowered to effect such transfers through the personal representatives.

Thus, no matter its origins and defenders,¹⁰⁰ the rule of offers terminating upon the offeror’s death is, without question, outmoded, unnecessary, and undesirable.¹⁰¹

B. The Solution: Discard the Rule in Favor of Analyzing Objective Appearance of Intent

Solving the problem of the “dying offer” rule is simple: eliminate it.

99. *Id.* § 262.

100. Professor Val Ricks has written an excellent article on the “dying offer” problem, entitled *The Death of Offers*. Ricks, *supra* note 82. In his article, Professor Ricks argues that the dying offer rule, though incorrect in its assumption that subjective intent is required under modern contract law, nevertheless should be retained because it reaches a just result in most situations. *Id.* at 670. Ricks divides his analysis along three different fact scenarios which could arise: (a) when the offeree attempts to accept the offer or rely on it *after* receiving notice of the offeror’s death, (b) when the offeree attempts to accept the offer *before* receiving notice of the offeror’s death but in which *no reliance* on the offer occurs, and (c) when the offeree, *before* receiving notice of the offeror’s death, reasonably incurs costs *in reliance* on the offer or on the offeree’s reasonable belief in the existence of a completely formed contract. *Id.* at 670–71. For situations (a) and (b), most of Ricks’ rationale is connected with problems caused by the offeror’s death: the dead offeror can no longer perform, the offeree has no party to send an acceptance, the offeree can speculate since the offeror can no longer revoke, and the offeror no longer has any autonomy interests worthy of protection. *Id.* at 686–98. However, putting the estate into the position as the successor to the offeror solves most of these problems. Ricks also says that the dying offer rule is unjust in situation (c), but that courts could apply the principles of promissory estoppel to protect an offeree who has relied on the offer or promise of the deceased offeror. *Id.* at 700–05 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90). While this is a wonderfully innovative and clever solution, it is unnecessary, since discarding the dying offer rule in the first place would also solve the problem in situation (c). *Cf.* Oliphant, *supra* note 24, at 210 (“It is no answer to say that the offeree can, in a proper case, recover on principles of *quasi* contracts because what is now being examined is the merit of this rule in the law of contracts.”).

101. See MURRAY, *supra* note 24, § 42(E), at 124.

As Professor Corbin said long ago:

[T]here is not, as is often supposed, any compelling necessity for its existence. It may be said that you cannot contract with a dead man; but neither can you force a dead man to pay his debts contracted before his death. Yet the law has no difficulty, in the latter case, in creating legal relations with the dead man's personal representative, and there would be no greater difficulty in declaring the power of acceptance to survive as against the offeror's representative or in favor of the offeree's representative.¹⁰²

The rule could easily be eliminated, and doing so would be in complete accord with the objective theory of contracts. Given the long-standing nature of the rule, any change would probably have to come by way of legislation rather than court decision.¹⁰³ But such changes have already been implemented in certain contexts¹⁰⁴ and therefore could easily be implemented on a universal basis. Contract law's existing doctrines can easily fill in the vacuum left by eliminating the rule, and the doctrines can provide adjudications that are more consistent with, and that vindicate some of the underlying policies of, the rules on contract formation specifically.

To illustrate how existing contract doctrine would handle the variety of fact patterns that arise in this context, it is helpful to divide them into three categories: scenarios where the offeree remains ignorant of the offeror's death prior to acceptance; scenarios where the offeree discovers the offeror's death prior to acceptance; and scenarios where, if a contract is formed by the offeree's acceptance before knowledge of the offeror's death is obtained, the doctrine of impracticability discharges the offeror's estate from further obligation and liability under the formed contract.

First, the objective theory clearly provides that if the offeree has no knowledge of the death, then the offer should remain viable. Modern objective theory states that "[a] party's intention will be held to be what

102. Corbin, *supra* note 81, at 198.

103. RESTATEMENT (SECOND) OF CONTRACTS § 48 cmt. a ("In the absence of legislation, the rule remains in effect.").

104. *Id.* ("Some inroads have been made on the rule by statutes and decisions with respect to bank deposits and collections, and by legislation with respect to powers of attorney given by servicemen." (citing U.C.C. § 4-405; RESTATEMENT (SECOND) OF AGENCY § 120 & cmt. a (1958))). The American Law Institute has recently published the Third Restatement on Agency Law. That Restatement contains a new provision, which is a change from prior law, and provides that death of a principal does not terminate the agent's authority until the agent has notice of the death. RESTATEMENT (THIRD) OF AGENCY § 3.07(2) (2006). This provision conforms the Restatement to an oft-cited federal decision, as well as the Uniform Durable Power of Attorney Act. Ricks, *supra* note 82, at 682 (citing Schock v. United States, 56 F. Supp. 2d 185 (D.R.I. 1999), *aff'd on other grounds*, 254 F.3d 1 (1st Cir. 2001); UNIF. DURABLE POWER OF ATTORNEY ACT § 4, 8A U.L.A. 255 (1979)).

a reasonable person in the position of the other party would conclude the manifestation to mean.”¹⁰⁵ The offeror, while alive, manifested an intent, by making the offer, to be bound.¹⁰⁶ Absent knowledge of the death, a reasonable person in the position of the offeree would assume that the offer continued. “Under an objective theory, the contrary holding [the offer survives] can readily be justified since there is no difficulty in establishing manifested mutual assent even though the offeror has died or become incapacitated, assuming the offeree is not aware of the fact.”¹⁰⁷ Therefore, as long as the offeree remains ignorant of the offeror’s death, the offer should continue.

The next scenario to consider is the offeree who discovers that, prior to accepting the offer, the offeror has died. Unlike the situation where the offeree remains ignorant of the offeror’s death, commentators have universally assumed the modern soundness of the dying offer rule in the case where the offeree becomes aware of the death since, they assume, this automatically means that the offeree should realize the offeror no longer intended to be bound.¹⁰⁸ This will be the case in many instances, under objective theory, but a categorical application of the dying offer rule would be unreasonable. Rather, absent the automatic dying offer rule, objective theory should inquire whether the offeror’s estate, under the offeror’s presumed wishes, continues assenting to the offer. The impracticability analysis could probably help inform this inquiry. If a contract, if formed, would be impossible to perform after the offeror died, then objective theory would likely conclude that a reasonable person in the position of the offeree would no longer perceive a continuing intent to be bound. However, this will not be true for some contracts, such as those in which the offeror was simply bound to pay money or convey title to property. These actions could still be done by the representative of the offeror’s estate and may still be beneficial to the estate and all of the heirs. Moreover, in some instances, the facts may clearly evidence the offeror’s intent for the offer to survive the offeror.¹⁰⁹ If the evidence indicates that a reasonable person in the

105. PERILLO, *supra* note 3, § 2.2, at 28.

106. RESTATEMENT (SECOND) OF CONTRACTS § 24 (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”).

107. MURRAY, *supra* note 24, § 42(E), at 125.

108. See Oliphant, *supra* note 24, at 209 (“It seems clear that, where the offeree learns of the death of the offeror before he has acted in reliance upon the expectation aroused by the offer, he cannot bind the offeror’s estate by a subsequent acceptance.”); PERILLO, *supra* note 3, § 2.20(c), at 93 (“The rule is logical if the offeree is aware of the offeror’s death because knowledge of death would be tantamount to a revocation”); MURRAY, *supra* note 24, § 42(E), at 125 (“If the offeree is aware of it [the offeror’s death], clearly there should no longer be a power of acceptance.”).

109. Professor Ricks found one such case, an admitted “rare scenario,” which was *In re Estate of*

position of the offeree would still believe that the offeror's estate wished to proceed with the contract, then there is no reason to arbitrarily take that ability away through the automatic application of the dying offer rule. Thus, in the situation where the offeree discovers that the offeror has died, the offer should not be automatically terminated. Rather, courts should analyze the continuing nature of the offeror's manifested intent from the vantage point of a reasonable person in the position of the offeree. If a reasonable person would assume the offeror, via the offeror's estate, no longer wished to be bound, then the death in effect should be held to constitute a revocation.¹¹⁰ If, however, a reasonable person would assume the offeror, via the offeror's estate, wished to still be bound, then the offeree should remain free to accept the offer and form a contract.

The scenario whereby an offeree signals his acceptance prior to the offeror's death, thereby forming a contract, is more sympathetic than the scenario where a knowing offeree attempts acceptance. As discussed earlier, however, the question remains as to whether the offeror, via the offeror's estate, should be discharged by the doctrine of impracticability.¹¹¹ And this should be analyzed under this well-established doctrine: if the contract assumed the offeror's continued survival because his personal performance is necessary to the contract—such as an employment contract or other personal services contract—then the impracticability doctrine serves to free the offeror's estate from any further liability or obligation on the contract.¹¹² The offeree, prior to learning of the offeror's death, may have incurred expenditures or may have relied on the offeror's offer and assurances. In this instance, courts would have recourse to the doctrine of promissory estoppel, as noted by

Severtson, No. C7-97-1249, 1998 WL 88253 (Minn. Ct. App. Mar. 3, 1998), cited in Ricks, *supra* note 82, at 705–07. *Severtson* involved an elderly neighbor who offered to sell her real property to her younger next door neighbor. *Id.* at *1. The written offer signed by the elderly neighbor—intended to be an option contract with binding consideration but the “neighborly” seller refused payment—stated that the “[p]urchase price agreed upon is \$100,000, to be paid to Helen Severtson if living or to the Estate of Helen Severtson if she is deceased or incapacitated.” *Id.* Therefore, in this particular case, clearly the offeror “apparently intended her offer to survive her.” Ricks, *supra* note 82, at 706.

110. The revocation, in this case, would most likely be considered indirect, since it was not effected by direct communication from the offeror to the offeree. Compare RESTATEMENT (SECOND) OF CONTRACTS § 43 (“An offeree’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.”), and *Dickinson v. Dodds*, 2 Ch. D. 463 (1876), with RESTATEMENT (SECOND) OF CONTRACTS § 42 (“An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.”).

111. PERILLO, *supra* note 3, § 2.20(c), at 93 (“If [the offeree] accepts before [the offeror] dies, there is a contract and the only question presented would be whether [the offeror’s] estate would have the defense of impossibility of performance.”).

112. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261–62.

Professor Ricks.¹¹³ Under that doctrine:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.¹¹⁴

Thus, if an offeror should have expected that his offer would have induced action, then recovery should be had for any such action or reliance, even after the offeror's death. Justice would countenance this result, and it provides some consolation to an otherwise disadvantaged offeree who is deprived of the full expectation of the originally proposed contract because of the offeror's death after formation.

The elimination of the automatic dying offer rule, in favor of the utilization of traditional objective theory buttressed with promissory estoppel and the impracticability doctrine, vindicates all of the underlying purposes of contract law furthered by the objective theory. The offeree's personal autonomy is preserved because the offeree retains the power to decide, on the offeree's own terms, whether to manifest an acceptance and thereby create a binding contractual obligation between the parties. Furthermore, where the offeree learns of the offeror's death before attempting an acceptance, allowing the reasonable expectations of the offeree to serve as the barometer of contract formation, rather than automatically terminating the offer, gives maximum freedom of contract and autonomy to the offeree. It also gives the same autonomy to the estate of the offeror, which may wish to consummate a contract for the good of the estate, its heirs, and its creditors.¹¹⁵ Therefore, eliminating the Death of Offeror rule would serve these important ends of contract law while simplifying and harmonizing this area of the law.

113. See Ricks, *supra* note 82, at 700–05.

114. RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

115. One concern of this changed rule may be the possible imposition on personal representatives of the offeror's estate. A fair criticism is that the personal representative may possibly be subject to the acceptance of offers made by the offeror while alive, of which the personal representative has no knowledge, and which therefore make it difficult to adequately plan and administer the assets of the offeror's estate. However, this is already true to some extent with existing contracts and assets of the decedent. There is every reason to believe that, in many if not most instances, the offeror will have kept some type of record of the offer he made in his personal effects and files, just as he does with existing asset and contract records. Perhaps, with any legislation implementing the elimination of the dying offer rule, a provision could be made whereby the offeree, upon discovering the death of the offeror, has an obligation to give prompt notification to the offeror's personal representative of both the existence of the offer, and the offeree's intention to consider the offer open.

IV. THE MAILBOX RULE

A. The Rule, Its History, and Its Inconsistency with Objective Theory

Virtually all promissory communications relating to the formation or destruction of a potential bilateral contract must be communicated and received—except one. When the offer invites acceptance by mail or a similar medium, an acceptance returned in the mail is effective immediately upon dispatch.¹¹⁶ The Mailbox Rule,¹¹⁷ as its known, makes the acceptance operative from the moment it is placed in the mail or otherwise put out of the offeree's possession, even if the acceptance never reaches the offeror.¹¹⁸ Therefore, the rule allows formation of a contract by the offeree's dispatched acceptance before the offeror learns of the acceptance.¹¹⁹

The mailbox rule traces its origin to *Adams v. Lindsell*.¹²⁰ In *Adams*, the defendant sent a written offer to sell wool to the plaintiffs by mail.¹²¹ The defendants misdirected the letter so the plaintiffs did not receive the offer for a day or so.¹²² The plaintiffs, desirous of accepting the offer, promptly posted an acceptance letter in the mail.¹²³ However, because the acceptance did not arrive on the day that the defendants expected it—a consequence they unknowingly caused by the offer's misdirection—the defendants assumed the plaintiffs had decided not to

116. RESTATEMENT (SECOND) OF CONTRACTS § 63 ("Unless the offer provides otherwise, . . . an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . .").

117. See, e.g., Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196, 198 (1995).

118. RESTATEMENT (SECOND) OF CONTRACTS § 63(a); Beth A. Eisler, *Default Rules for Contract Formation by Promise and the Need for Revision of the Mailbox Rule*, 79 KY. L.J. 557, 563 (1990) (citing *United Leasing, Inc. v. Commonwealth Land Title Agency of Tucson, Inc.*, 656 P.2d 1246, 1250 (Ariz. Ct. App. 1982); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.22 (1990)). The benefit of this rule depends, however, on the acceptance being dispatched properly, such as to the correct addressee and with the proper address. See PERILLO, *supra* note 3, § 2.23(a), at 110 ("The [mailbox rule] prevails generally throughout the U.S., with the qualification that the acceptance must be dispatched in a proper manner." (footnote omitted)).

119. See MURRAY, *supra* note 24, § 47(A).

120. 106 Eng. Rep. 250 (K.B. 1818). See also Valerie Watnick, *The Electronic Formation of Contracts and the Common Law "Mailbox Rule,"* 56 BAYLOR L. REV. 175, 177–78 (2004) ("This rule of law, oft-called the 'mailbox rule,' originated in England at a time of widespread use of the post. Today, as more efficient methods of communication are routinely used, the rule's application has declined." (citing *Adams*, 106 Eng. Rep. 250; Paul Fasciano, Note, *Internet Electronic Mail: A Last Bastion for the Mailbox Rule*, 25 HOFSTRA L. REV. 971, 977 n.17 (1997))).

121. 106 Eng. Rep. at 250.

122. *Id.* at 250–51.

123. *Id.* at 251.

accept the deal, and they sold their wool to a third party.¹²⁴ The court was called upon to decide whether acceptance became effective upon the its dispatch or upon its receipt. The court decided that contract was complete upon dispatch, not only upon receipt of the mailed acceptance, because:

if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.¹²⁵

At least a couple of observations about the holding of *Adams v. Lindsell* bear mentioning. First, the court's concern that "no contract could ever be completed by the post" if an actual receipt requirement were imposed seems to be, at the very least, an exaggeration. Mutual assent requires two acts—an offer and an acceptance. If the law imposes an actual receipt requirement, the acceptance would be complete—and the contract formed—upon its actual receipt by the offeror. As a matter of contract formation, contract law does not require, as the *Adams* court infers, a "third requirement" that the offeror notify the offeree that the acceptance was received and "assented to."¹²⁶ As a practical matter, this information undoubtedly would be helpful to the offeree and would precede the parties' performance under the contract, but it is clearly unnecessary to the technical formation of the contract. And, in fact, since such post-acceptance notifications were not technically necessary, the court's reasoning "and so it might go on ad infinitum" is hyperbole, without which the court may well have been inclined to adopt an actual receipt requirement for postal acceptances.

Second, under the doctrine of indirect revocation as it has since developed, the adoption of the dispatch rule was unnecessary to the court's holding. Recall that, prior to receiving the plaintiff's acceptance letter, the defendants sold their wool to a third party.¹²⁷ The court apparently assumed that forming a contract only upon defendants'

124. *Id.*

125. *Id.*

126. *Id.* Professor Williston made this same observation, noting that "[t]o modern thinking a requirement that the acceptance should be received would not involve the conclusion that the offeror must then accept the acceptance, and so go on ad infinitum." Williston, *supra* note 23, at 86 n.6.

127. *Adams*, 106 Eng. Rep. at 251.

receipt of an acceptance would have otherwise effected a revocation of the offer had the dispatch rule not been announced so as to result in a conclusion that the contract had been formed prior to this third-party sale. However, because the sale to the third-party was not communicated to the plaintiffs, or otherwise brought to their recognition, no revocation should have been found.¹²⁸ The resultant effect is that, no revocation having occurred, the court could have still found for the plaintiffs by holding that their acceptance was effective upon defendants' receipt of their letter since the offer had not been directly or indirectly revoked prior to this time.

Nevertheless, the rule in *Adams v. Lindsell* has become widely followed. The Restatement drafters explain that the basis of the rule is that "the offeree needs a dependable basis for his decision whether to accept,"¹²⁹ which mirrors the reasoning of the *Adams* court itself. Above all, the primary bases typically articulated for the rule are the need for certainty and stability.¹³⁰

However, the rule is unquestionably inconsistent with the objective theory of contracts. Recall that the modern formulation of objective theory requires that "objective manifestations of intent of [a] party should generally be viewed from the vantage point of a reasonable person in the position of the other party."¹³¹ In this case, the manifestation of intent at issue is the acceptance. Thus, objective theory requires that the manifestation of acceptance be viewed from the vantage point of a reasonable person in the position of the offeror. Say that on Day 1, A mails an offer to B, which B receives on Day 2. On Day 3, B mails an acceptance, which A receives on Day 4. The mailbox rule provides that a contract is formed on Day 3, the day of dispatch. However, on Day 3, the fact of the acceptance is completely unknown to A. A reasonable person in the position of A would not have any way to make an informed conclusion about the acceptance. A would learn of B's acceptance only after A actually received the acceptance on Day 4. Objective theory would find the acceptance effective upon A's receipt when both A and B know of each other's manifestations, not on B's

128. Later, an offeree's discovery of information inconsistent with the offeror's desire to continue to enter into the contract with the offeree clearly could constitute an indirect revocation, even absent any direct communication of such lack of assent by the offeror. *Dickinson v. Dodds*, 2 Ch. D. 463 (1876). However, even in that event, information had to come to the attention of the offeree to effect a revocation. No such occurrence appears to have happened in *Adams v. Lindsell*, but rather the offeree in that case seems to have been completely unaware of the sale to the third party.

129. RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981).

130. See Watnick, *supra* note 120, at 179-80; MURRAY, *supra* note 24, § 47(A), at 162.

131. PERILLO, *supra* note 3, § 2.2, at 27 (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760-61 (2d Cir. 1946) (Frank, J., concurring)).

dispatch when only B knows of A's manifestations.

The mailbox rule and its defiance of the objective theory of contracts can be explained based on the historical accident that *Adams v. Lindsell* was adjudicated at a time when the subjectivists happened to hold the most sway over legal thinking:

At the present time courts of law . . . have generally turned from this [subjective] theory of contracts which was emphasized during the half century or more following the year 1790, and have expressly or by implication asserted that the words and acts of the parties are themselves the basis of contractual liability, and not merely evidence of a mental attitude required by the law. . . . Students seek for a reason why a letter of acceptance is effective when mailed, while a letter revoking an offer is ineffective until received. The actual reason for the distinction is that the former rule was settled in the early part of the nineteenth century, and the latter rule not until the second half of the century. Had the question been squarely raised prior to 1850, there can be little doubt that mailing a letter of revocation would have been held sufficient.¹³²

Not only is the mailbox rule inconsistent with the objective theory of contracts, but it stands out as an aberration to the otherwise nearly invariable rule that manifestations of mutual assent must be communicated and received to be effective.¹³³ The initial offer by the offeror must, of course, be received by the offeree to create the power of acceptance.¹³⁴ After this, at least three, and perhaps four, possibilities could occur next. The offeror may have second thoughts and decide to withdraw the offer—a revocation.¹³⁵ The offeree may desire to accept

132. Williston, *supra* note 23, at 87. Professor Williston further observed that “[i]t was rather on account of the necessity of the situation than because logical requirements were thought to be satisfied that it was held in *Adams v. Lindsell*, that mailing a letter of acceptance completed a contract proposed by a letter sent through the post.” *Id.* at 86 (footnote omitted). Moreover, the rule has been thought to be the result of subjective thinking, probably because at the instant the offeree decided to accept and mailed the letter, both parties were now “of the same mind” as to the intent to contract. See KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 182 (1990) (“[T]he subjective standard was reinforced” by *Adams v. Lindsell*.), quoted in Perillo, *supra* note 4, at 439 n.77. By contrast, Professor Perillo does not agree that there is anything inherently “subjectivist” in the *Adams* decision. Perillo, *supra* note 4, at 439 (“Curiously, some scholars . . . claim that *Adams v. Lindsell* . . . was . . . based on a subjective theory. One cannot gather from the report of the case whether a subjective or objective theory nurtured the court’s decision. The court seems to have had the pragmatic goal of finding a rationale to uphold the formation of contracts by correspondence.” (footnote omitted)).

133. See Eisler, *supra* note 118, at 558 (“The dispatch or mailbox rule departs from the parties’ expectations and from a more logical rule which would be in keeping with modern communications technology. The mailbox rule also fails to parallel existing formation default rules.” (footnote omitted)).

134. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”); see also LANGDELL, *supra* note 30, at 15 (“[C]ommunication to the offeree is of the essence of every offer.”).

135. See RESTATEMENT (SECOND) OF CONTRACTS § 42.

the offer—an acceptance.¹³⁶ Or, the offeree may choose to reject the offer outright,¹³⁷ or propose a counteroffer.¹³⁸ In all of these instances, save only an initial acceptance by mail, the applicable manifestations of intent are only effective upon the other's receipt of the manifestation.¹³⁹ Moreover, the mailbox rule is made inapplicable in the event of an option contract,¹⁴⁰ and the offeror always has the power to specify in the express terms of the offer that any acceptance must be actually received in order to be effective.¹⁴¹ The mailbox rule is thus aberrational. Most parties would "expect that the default rule that governs acceptance would be the same as the default rules that govern offer, revocation, and rejection."¹⁴²

The oddity of the mailbox rule and how it manipulates standard rules of offer and acceptance are highlighted by the treatment of a vacillating offeree. Say that A mails an offer to B on Day 1, and B receives the offer on Day 2. On Day 3, B mails a rejection. But on Day 4, B, after a change of mind, mails an acceptance. Applying the mailbox rule in this scenario would be problematic because A may receive the rejection first, rely on it, and deal with another party. To address this problem, section 40 of the Restatement makes the mailbox rule inapplicable in this scenario and instead provides that the first communication received by the offeror—the rejection or the acceptance—is effective.¹⁴³

136. See *id.* § 63.

137. See *id.* § 38.

138. See *id.* § 39.

139. Compare *id.* § 42 ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract."), and *id.* § 40 ("Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror . . ."), with *id.* § 63(a) ("Unless the offer provides otherwise, . . . an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . .").

140. *Id.* § 63(b).

141. See Corneill A. Stephens, *Escape from the Battle of the Forms: Keep it Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233, 237 (2007) ("At common law, the offeror was deemed to be the master of his offer. That is, the offeror was master of the terms of the contract created by acceptance of the offer. As such, the offeree could accept the offer only by exactly complying with the terms of the offer." (footnote omitted) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 29, 58)); PERILLO, *supra* note 3, § 2.23(a), at 112 ("The offeror, it must be remembered, is master of the offer and has power to negate the mailbox rule. This can be done by framing the offer so as to require actual receipt of an acceptance as a precondition to the formation of the contract. However, such a requirement must be clearly expressed." (footnote omitted) (citing *Union Interchange, Inc. v. Sierota*, 355 P.2d 1089 (Colo. 1960); *Holland v. Riverside Park Estates, Inc.*, 104 S.E.2d 83 (Ga. 1958); *Lewis v. Browning*, 130 Mass. 173 (1880); *W. Union Tel. Co. v. Gardner*, 278 S.W. 278 (Tex. Civ. App. 1925); 1 WILLISTON ON CONTRACTS § 6:40; RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. b)).

142. Eisler, *supra* note 118, at 569.

143. RESTATEMENT (SECOND) OF CONTRACTS § 40 ("Rejection or counter-offer by mail or

Accordingly, the offeree who deposited a rejection in the mail is advised to send subsequent acceptance by faster means, such as overnight delivery, fax, or e-mail.

Or, even more problematic, consider the scenario where, instead of rejecting first, B mails an acceptance to A on Day 3 and then, on Day 4 and after a change of mind, sends a rejection by expedited delivery so that it is received prior to the acceptance. Then B asserts a contract was formed in the first place by the mailbox rule. A strict application of the mailbox rule would provide that a contract formed immediately upon dispatch of the acceptance on Day 3. A's expectations, of course, would depend on which communication arrived first, the acceptance or the rejection. Assuming the rejection arrived first, A's expectations (no contract) would be at odds with the legal conclusion formed by operation of the mailbox rule (contract). There is authority for the proposition that, in this instance, B will be estopped from enforcing the contract formed by the mailbox rule based on A's reliance on the prior-arriving rejection.¹⁴⁴

As is readily apparent, the mailbox rule tortures other contract doctrines to conform to its aberrational nature. Furthermore, the rule is based on questionable, or at least antiquated, notions of the problems allegedly inherent in communicating through the mails or otherwise. Like the dying offer rule, the mailbox rule is arbitrary and outmoded.

B. The Solution: Discard the Rule in Favor of Analyzing Objective Appearance of Intent

Solving the problem of the mailbox rule is easy: eliminate it. The mailbox rule is inconsistent with the objective theory of contracts, which vindicates freedom of contract and personal autonomy concerns.¹⁴⁵ It is a historical accident of the temporary ascendancy of the subjective theory of contracts.¹⁴⁶ It was based on questionable assumptions by the court.¹⁴⁷ It is an aberration from the normal rule of contract law that

telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.”).

144. *E. Fredericks, Inc. v. Felton Beauty Supply Co.*, 198 S.E. 324 (Ga. Ct. App. 1938), *overruled on other grounds by* *Willis v. Hill*, 159 S.E.2d 145 (Ga. Ct. App. 1967), *rev'd*, 161 S.E.2d 281 (Ga. 1968); RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. c, *cited in* PERILLO, *supra* note 3, § 2.23(a), at 113.

145. *See supra* notes 71–80 and accompanying text.

146. *Williston, supra* note 23, at 87.

147. *See Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818) (decision assumed: (1) no contract could ever be completed by mail without mailbox rule, and (2) under the facts of the case the sale of the

communications intended to create, or destroy, contractual intent must be actually received to be effective.¹⁴⁸ The rule could easily be eliminated, by legislation if necessary, and the objective theory of contracts could be substituted in its place.

Consider again the example where A mails an offer to B on Day 1, and B receives the offer on Day 2. On Day 3, B mails an acceptance, which A receives on Day 4. Under the mailbox rule, the contract would be created on Day 3 even though A has no knowledge that a contract has been created at that point. And this is true, even if B's acceptance never reaches A (unless due to B's misaddressing of the letter).¹⁴⁹ That is, the mailbox rule places the risk of nondelivery on the offeror, even though the offeree places the acceptance letter in the mail. But the mailbox rule's risk allocation is hardly the only sensible outcome, as noted over a century ago by Dean Langdell:

It has been claimed that the purposes of substantial justice, and the interests of contracting parties as understood by themselves, will be best served by holding that the contract is complete the moment the letter of acceptance is mailed; and cases have been put to show that the contrary view would produce not only unjust but absurd results. The true answer to this argument is, that it is irrelevant; but, assuming it to be relevant, it may be turned against those who use it without losing any of its strength. The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*. As to making provision for the contingency of the miscarriage of a letter, this is easy for the person who sends it, while it is practically impossible for the person to whom it is sent.¹⁵⁰

True, the offeror, in the original offer, could specify that acceptance must be received to be effective, and in that sense, the offeror has

wool to a third party would have been sufficient to constitute a revocation absent formation of the contract via the mailbox rule); see also *supra* notes 126–128 and accompanying text.

148. See *supra* notes 134–144 and accompanying text.

149. RESTATEMENT (SECOND) OF CONTRACTS § 63(a); Eisler, *supra* note 118, at 563 (citing *United Leasing, Inc. v. Commonwealth Land Title Agency of Tucson, Inc.*, 656 P.2d 1246, 1250 (Ariz. Ct. App. 1982); 1 FARNSWORTH, *supra* note 118, § 3.22). The benefit of this rule depends, however, on the acceptance being dispatched properly, such as to the correct addressee and with the proper address. See PERILLO, *supra* note 3, § 2.23(a), at 110 (“The [mailbox rule] prevails generally throughout the U.S., with the qualification that the acceptance must be dispatched in a proper manner.” (footnote omitted)).

150. LANGDELL, *supra* note 30, at 20–21 (footnotes omitted).

control of the outcome.¹⁵¹ However, often an offeror will not think to do this, and in those instances, the ability to control the means of acceptance is left with the offeree. Dean Langdell was correct that, between the offeror and the offeree, the offeree is in the best position to protect itself by the means of acceptance. And further, using an actual receipt rule, the worst case scenario for a miscarried acceptance is simply that no contract is formed.¹⁵² On the other hand, the mailbox rule's worst case scenario is that a contract is formed despite one of the parties having no knowledge of it.¹⁵³

And the offeree, in this present era, has a multitude of means by which to communicate an acceptance in an expeditious manner: fax, telephone, cellular phone, text message, e-mail, and text message.¹⁵⁴ Eliminating the mailbox rule will shift the advantage from the offeree to the offeror, but this makes good sense:¹⁵⁵

Because substantially instantaneous methods of communication are now so inexpensive and common, the burden should be placed on the offeree if he refuses to take advantage of these modes of communication. If an offeree refuses to use [these] . . . substantially instantaneous methods of communication, the offeree's convenience should not be protected.¹⁵⁶

The elimination of the mailbox rule should also lead to greater economic efficiency in contracting. Economists state that open communication is necessary for efficient contracting.¹⁵⁷ Open communication only is achieved when both parties have actually received all communications from the other party. The mailbox rule fails to achieve this, but an actual receipt rule serves these economic exchange purposes much better.

Finally, eliminating the mailbox rule and requiring actual receipt of an acceptance for it to be effective would protect the freedom of contract and autonomy of the parties. To fully preserve this autonomy, courts should not enforce a contract against an offeror unless a reasonable

151. See Stephens, *supra* note 141, at 327 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 29, 58); PERILLO, *supra* note 3, §2.23(a), at 112 (citing *Union Interchange, Inc. v. Sierota*, 355 P.2d 1089 (Colo. 1960); *Holland v. Riverside Park Estates, Inc.*, 104 S.E.2d 83 (Ga. 1958); *Lewis v. Browning*, 130 Mass. 173 (1880); *W. Union Tel. Co. v. Gardner*, 278 S.W. 278 (Tex. Civ. App. 1925); 1 WILLISTON ON CONTRACTS § 6:40; RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. b)).

152. LANGDELL, *supra* note 30, at 21.

153. *Id.*

154. The offeree can still communicate an acceptance to the offeror face-to-face! Though, this is admittedly becoming less common in our society. See JOHN L. LOCKE, *WHY WE DON'T TALK TO EACH OTHER ANYMORE: THE DE-VOICING OF SOCIETY* (1999).

155. Eisler, *supra* note 118, at 568.

156. *Id.* at 568–69 (footnote omitted).

157. *Id.* at 571 (citing R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988)).

person in the offeror's position would believe a contract was formed. This cannot happen until the offeror actually receives the acceptance. After making an offer, but before acceptance, the offeror has the right to revoke the offer.¹⁵⁸ The mailbox rule arbitrarily cuts the offeror's revocation right short in favor of an unbargained-for right of the offeree to immediately bind the offeror on dispatch of an acceptance. "The offeree should not receive this unexpected and unbargained-for protection. If the offeree wants the protection of an irrevocable offer, the offeree should be required to obtain an option from the offeror."¹⁵⁹ Otherwise, the autonomy of both parties should be protected, and each should only be able to bind the other by effective communication that is received by the other party before the communication forms or rejects a contract. This furthers contract law's quintessential principles of freedom of contract and personal autonomy.

V. CONSENT TO STANDARD FORM CONTRACTS

A. The Origin of Form Contracts and Generally Applicable Rules

Standard form contracts are ubiquitous. As David Slawson remarked in 1971:

S[standard] form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.¹⁶⁰

158. RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981) ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.").

159. Eisler, *supra* note 118, at 566–67. As Professor Eisler points out, actually the offeree may seek or obtain the protection of irrevocability in ways other than simply obtaining an expressly bargained-for option, such as a signed writing, a "firm offer" under the UCC, or reliance on an offer. *See id.* (citing N.Y. GEN. OBLIG. LAW § 5-1109 (McKinney 1989); U.C.C. § 2-205 (1990); RESTATEMENT (SECOND) OF CONTRACTS §§ 87(2), 90; *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958)).

160. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). One of the earliest academic descriptions of the rising phenomenon of standard form contracts observed:

No longer do individuals bargain for this or that provision in the contract The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor In the trades affected it is henceforth

The use of standard form contracts has only increased since the time of Slawson's observations.¹⁶¹

The impact of form contracting is difficult to overestimate. Henry Maine observed in 1861 that "the movement of the progressive societies has hitherto been a movement from Status to Contract."¹⁶² Maine's observation recognized the move away from stratification based on fixed classes in favor of freedom of contract. However, scholars soon began wondering if the standard form contract was threatening to philosophically reverse that trend.¹⁶³

Professor Rakoff identified seven quintessential attributes of a standard form contract. First, it consists of a printed form containing several terms in the form of a contract. Second, the contract is drafted by one of the contracting parties to the agreement, typically a merchant. Third, the merchant engages in a volume of the same types of transactions on a regular basis. Fourth, the merchant imposes the form on the consumer on a "take-it-or-leave-it" basis. Fifth, the consumer will usually sign the contract after minimal, if any, negotiation. Sixth, the consumer does not similarly engage in a volume of the type of transaction at issue. Seventh, the principle consumer obligation is usually to pay money.¹⁶⁴

The reasons that merchants desire to use standard form contracts are fairly clear. Form contracts are widely used because they are fully

futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Meyerson, *supra* note 37, at 1264 (alterations in original) (quoting OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 18 (1937), reviewed by Karl Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939)).

161. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003).

162. HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Thoemmes Press 1996) (1861) (emphasis omitted).

163. See generally Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640–41 (1943) ("Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. This spectacle is all the more fascinating since not more than a hundred years ago contract ideology had been successfully used to break down the last vestiges of a patriarchal and benevolent feudal order in the field of master and servant Thus the return back from contract to status which we experience today was greatly facilitated by the fact that the belief in freedom of contract has remained one of the firmest axioms in the whole fabric of the social philosophy of our culture." (footnote omitted) (citing Note, "Mutuality" in *Exclusive Sales Agency Agreements*, 31 COLUM. L. REV. 830 (1931))).

164. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).

customizable to the transaction and parties involved.¹⁶⁵ Merchants use form contracts to insert boilerplate terms that reduce or eliminate a variety of risks.¹⁶⁶ By reducing risks, merchants can offer lower prices for their goods and services, and can increase their profits.¹⁶⁷ The prevalence of their use is itself indicative of the indispensable nature of form contracts to commercial activity.¹⁶⁸

Consumers have a different perspective on standard form contracts. From their perspective, form contracts (1) are not usually subject to negotiation, (2) contain terms governing unlikely contingencies, (3) are only scrutinized for certain key terms, and (4) are routinely disregarded by consumers in favor of simply taking into account the reputation of the enterprise.¹⁶⁹ "The consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated."¹⁷⁰

Above all, consumers simply do not read standard form contracts.¹⁷¹ The system assumes, however unrealistically, that the consumer has read and understood the form and consents to every term. On this basis, the

165. Kessler, *supra* note 163, at 631.

166. *Id.*

167. *Id.* at 632.

168. Slawson, *supra* note 160, at 530.

169. Rakoff, *supra* note 164, at 1225–28. As Hillman and Rachlinski point out:

Consumers also have good reason to believe that the standard terms are not something to worry about. Consumers recognize that boilerplate language is usually a matter of customary practice within an industry, rather than an attempt by a single business to exploit them. . . . Consumers may sign standard-form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.

Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446–47 (2002) (footnotes omitted) (citing John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 286–90 (2000); Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 229 (1998); Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1482 (1989)).

170. Rakoff, *supra* note 164, at 1229.

171. See *id.* at 1179 (citing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 731 (1979); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 & n.338 (1960); IAN R. MACNEIL, *CONTRACTS* 445 (2d ed. 1978); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 13 (1981); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970); Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 673 (1925); Arnold Louis Rotkin, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, 1977 ARIZ. ST. L.J. 599, 603; Slawson, *supra* note 160, at 531; William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 425–26).

law of contracts has heretofore subsumed form contracts within its structure.

The traditional contracting process and the rules developed to govern such process are based on the consensual and knowing incurrence of promissory obligations. And so a dissonance exists between that paradigmatic model and the reality of standard form contracting.¹⁷² Professor Meyerson has observed that “[s]tandard form contracts have been in use for over two centuries, and the question of the proper construction of these contracts has haunted contract law ever since.”¹⁷³ Thus, perhaps unsurprisingly, the law has attempted to handle standard form contracts differently than individually negotiated agreements.¹⁷⁴

Karl Llewellyn set forth an early theory of consumer assent to standard-form contracts:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.¹⁷⁵

The “blanket assent” described by Llewellyn can theoretically be troublesome because it vests tremendous trust in the merchant. However, Llewellyn’s theory requires that the merchant not abuse this trust by inserting “unreasonable” or “indecent” terms into the form contract.¹⁷⁶ Llewellyn observed that most unread terms are reasonable and unobjectionable. He thus proposed a doctrine that differentiated these clauses from the ones of “oppression or outrage.”¹⁷⁷ The modern

172. Rakoff, *supra* note 164, at 1180.

173. Meyerson, *supra* note 37, at 1263. Meyerson observes that the first use of standard form contracts was in the marine insurance industry. *Id.* at 1263–64 (citing PRAUSNITZ, *supra* note 160, at 11, reviewed by Llewellyn, *supra* note 160).

174. Rakoff, *supra* note 164, at 1174. Rakoff illustrated this by point by alluding to the then newly-drafted section 211 of the Restatement, as well as new sections in Corbin’s treatise. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 559A–559I (C. Kaufman Supp. 1982)).

175. LLEWELLYN, *supra* note 171, at 370.

176. *Id.*; see also Rakoff, *supra* note 164, at 1200 & n.98 (observing that comment b states that the consumer “trust[s] to the good faith of the party using the form” (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b)).

177. LLEWELLYN, *supra* note 171, at 366 (“[A]mong those terms which plainly are in fact

heir to Llewellyn's conceptualization is the unconscionability doctrine by which courts invalidate contracts if they find them unconscionable.¹⁷⁸

From the origins of Llewellyn's theory to the development of principles governing standard form contracts in the ensuing decades, several doctrines have been developed to govern their creation and use. Professor Rakoff described the following aspects of contract law's treatment of form contracts:

(1) The adherent's signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract.

(2) It is legally irrelevant whether the adherent actually read the contents of the document, or understood them, or subjectively assented to them.

(3) The adherent's assent covers all the terms of the document, and not just the custom-tailored ones or the ones that have been discussed.

(4) Exceptions to the foregoing principles are narrow. In particular, failure of the drafting party to point out or explain the form terms does not constitute an excuse. Instead, in the absence of extraordinary circumstances, the adherent can establish an excuse only by showing affirmative participation by the drafting party in causing misunderstanding.¹⁷⁹

B. Standard Form Contract Rules and Objective Theory

Rakoff's four theories regarding form contracts are all related, in some manner or other, to the objective theory of contracts.¹⁸⁰ The consumer need not subjectively assent to every term in the form. Instead, the consumer's apparent, external assent to the standard form as a whole provides an objectively reasonable appearance of contractual consent to a reasonable person in the position of the merchant.¹⁸¹ This is bound to the fact that consumers rarely read form contracts, though the law imposes on them a duty to do so (or binds them to the terms in any event).¹⁸² As Robert Braucher once observed regarding consumer assent

assented to only one time in a thousand[.] there are still many which are sound particularizations of the deal to the business, very useful and wholly within reason; and those ought to be sustained and applied. A workable guide for courts must offer some wherewithal to sort such out from the clauses of oppression or outrage . . ."), *cited in* Rakoff, *supra* note 164, at 1202.

178. See U.C.C. § 2-302 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 208.

179. Rakoff, *supra* note 164, at 1185.

180. *Id.* at 1185-86.

181. *Id.* at 1186.

182. 7 PERILLO, *supra* note 10, § 29.8, at 402-03 ("[O]ne having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature." (quoting *Rossi v. Douglas*, 100 A.2d 3, 7 (Md. 1953))); see also Rakoff, *supra* note 164, at

to form contracts, "We all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion."¹⁸³

But in another sense, assent to standard form contracts is problematic from the standpoint of the objective theory of contracts. The duty to read is quite one sided. This doctrine has placed the entire burden on the consumer, with only the unconscionability doctrine as a failsafe. The duty to read rule essentially allows merchants to insert one-sided terms at will, and consumers are simply bound if they sign. Professor Rakoff observed that "[t]his 'duty' can just as well be viewed as a refusal to impose any duty on the drafting party to ascertain whether form terms are known and understood."¹⁸⁴

But the objective theory of contracts should take into account the knowledge of merchants and their perspectives of the consumer's assent to their forms. Merchants know that consumers do not read their forms. Merchants know, or in many cases they reasonably should know, that a consumer may object to one or more terms in the contract (such as a severe forum selection clause, a damages limitation, or an arbitration clause). Modern objective theory provides that "objective manifestations of intent of [a] party should generally be viewed from the vantage point of a reasonable person in the position of the other party."¹⁸⁵ What then should the conclusion of objective theory be here? The consumer's manifestation of assent (the consumer's signature on the form) should be viewed from the perspective of a reasonable person in the position of the merchant. While a neutral, third-party observer might view the consumer's signature as final and definitive, the merchant (in my hypothetical) knew, or should have known, that the consumer would not agree to the objectionable clause. And this is problematic for traditional contractual assent as to that clause, but the law has basically overlooked this inconsistency with objective theory, probably for reasons of pragmatism and commercial reality.

Some commentators have acknowledged this inherent problem with standard form contracts and the duty to read rule. Karl Llewellyn recognized that "where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might

1185-86.

183. 47 A.L.I. PROC. 525 (1970).

184. Rakoff, *supra* note 164, at 1187.

185. PERILLO, *supra* note 3, § 2.2, at 27 (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760-61 (2d Cir. 1946) (Frank, J., concurring)).

reasonably expect to find on that paper.”¹⁸⁶ More modern commentators have acknowledged the problem as well:

[C]onfusion continues to reign mostly because those seeking answers have searched too hard. The conceptual difficulties stem from one fundamental error: the common law presumption, often conclusive, that consumers who sign form contracts are aware of, understand, and assent to the unread, unexpected and un contemplated terms in the form contracts. *This presumption of assent conflicts with the objective theory of contracts.* Because the drafters of these contracts know not only that their forms will not be read, but also that it is reasonable for consumers to sign them unstudied, a reasonable drafter should have no illusion that there has been true assent to these terms. . . .

In short, courts correctly applying the objective theory to consumer form contracts will not assume automatically that there is objective agreement to all terms merely because they have been printed and a document has been signed. Rather, courts will try to determine how a reasonable drafter should have understood the consumer’s agreement.¹⁸⁷

Unlike, possibly, the dying offer rule and the mailbox rule, standard form contracts are undoubtedly here to stay. However, the doctrines pertaining to these contracts, such as the duty to read rule, create severe dissonance between form contracts and the objective theory as to terms that the merchant knows would be objectionable to the consumer. Such doctrines, applied rigidly and without consideration of the merchant’s superior knowledge of the consumer’s preferences, are antithetical to the idea of full, knowing, and voluntary consent to contractual obligations. The extent to which merchants exploit the duty to read rule by inserting protective terms that they know the consumer will not read, even though the merchants also know, or should know, that the consumer would not agree to the term if consumer was made aware of it, is particularly objectionable. Standard form contract doctrines should therefore be reformed to conform to the objective theory of contracts as to these terms and thereby to protect the freedom of contract and personal autonomy of consumers entering into such contracts.

186. Meyerson, *supra* note 37, at 1277 (quoting Llewellyn, *supra* note 160, at 704). Meyerson observed that Llewellyn’s position bore a great deal of similarity to the doctrine of reasonable expectations in insurance law. *Id.* See generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) (describing the doctrine of reasonable expectations); Kessler, *supra* note 163, at 637 (arguing that courts should ascertain the consumer’s reasonable expectations in assenting to the form contract, and whether the business entity “disappointed reasonable expectations based on the typical life situation”).

187. Meyerson, *supra* note 37, at 1265 (emphasis added).

C. The Solution: Conform the Rules to Objective Theory

The solution is to incorporate objective theory explicitly into standard form contract disputes. Llewellyn's paradigm of consent to both dickered terms and to unread boilerplate should remain the starting point for analysis of assent to form contracts.¹⁸⁸ The duty to read rule springs from this philosophical vantage point, and it should also remain as a starting point. Again, most boilerplate terms will be unexceptional and unobjectionable, even if the consumer never has actual notice of them because the form remains unread. This approach squares with objective theory as an initial matter, because the merchant can take the consumer's outward manifestation of assent to the form (by signing it) as evidence that he has the requisite intent to be bound.

But this starting point should give way when there are, embedded in the form, one or more terms that the merchant knows (1) have gone unread by the consumer and (2) are, or may be, objectionable to the consumer. That is to say, the analysis under objective theory should take into account any superior knowledge that the merchant has over the hypothetical reasonable person otherwise observing the consumer's assent to the form. Contract law governing form contracts has, to date, simply glossed over this scenario, except to give consumers the possible escape hatch of the unconscionability doctrine.¹⁸⁹ But in the event the merchant knows an unread term in the form would be objectionable to a consumer if known, the consumer's assent to that term cannot withstand scrutiny under the objective theory of contracts. Specifically, a reasonable person in the position of a merchant would know that the consumer's assent to that term is defective. Stated another way, objective theory would not countenance a merchant exploiting a consumer's not reading a form by leavening the form with terms the merchant knows the consumer would likely not agree to.

Conveniently, such a rule has already been in place for some time, though to date it has not been widely used or adopted. That rule is section 211 of the Restatement, specifically subsection (3).¹⁹⁰ Section 211 provides as follows:

- (1) Except as stated in Subsection (3), where a party to an agreement

188. LLEWELLYN, *supra* note 171, at 370.

189. U.C.C. § 2-302 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

190. I have previously argued that subsection 211(3) should be adopted, in a wider analysis of all the problems inherent with standard form contracts. Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227 (2007). Here, I am simply focusing on the objective theory concerns addressed by subsection 211(3).

signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing. . . .

. . . .

*(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.*¹⁹¹

Subsection (1) of section 211 essentially codifies the “duty to read” paradigm that has been the hallmark of standard form contract jurisprudence to date.¹⁹² However, subsection (3) provides the means to incorporate objective theory into a standard form contract analysis. It provides a means of invalidating the consumer’s assent to a term, if the “other party” (which will invariably be the merchant) has reason to believe that the consumer would not agree to the contract if the consumer had read, and thereby known of, the objectionable term.¹⁹³ This subsection “is designed to deter merchants from exploiting the reality that consumers do not read standard form contracts, and thus prevents consumers from being ‘bound to unknown terms which are beyond the range of reasonable expectation.’”¹⁹⁴

Section 211(3) has not been widely adopted by courts or legislatures, and the reasons are unclear. Some commentators and courts apparently believe that existing doctrines, including mainly the unconscionability doctrine, sufficiently address the concerns presented by consumer agreement to unfair terms in standard form contracts.¹⁹⁵ At least one commentator condemned the misapplication of the rule by one jurisdiction that has adopted it.¹⁹⁶ But “[m]isapplication of legal rules by activist judges is always a risk, however, and [this commentator’s] condemnation of the rule is therefore not as severe as it might at first appear.”¹⁹⁷

191. RESTATEMENT (SECOND) OF CONTRACTS § 211 (emphasis added).

192. See Hillman & Rachlinski, *supra* note 169, at 458.

193. RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

194. Barnes, *supra* note 190, at 249 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f).

195. See *id.* at 249–51 (citing James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000)).

196. See White, *supra* note 195, at 346–47.

197. David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 291 n.223.

Applying section 211(3), or some close analog to it, and thereby incorporating the objective theory of contracts into any analysis of standard form contract disputes, would serve the underlying interests of freedom of contract and personal autonomy. Principles of fairness and good faith dictate that merchants should not be able to unfairly exploit the reality that consumers do not read form contracts. A merchant should not be able to take advantage of this scenario by surreptitiously placing terms in the contract form, which the merchant knows would be objectionable to the consumer if it were only brought to the consumer's attention in a meaningful way. This practice, countenanced for the better part of a century by traditional contract law and arguments of business necessity, is completely antithetical to the paradigm of knowing, mutual, and voluntary assent to contract terms. While business practices perhaps necessitate the use of standard forms, contract law diverged from a cognitively sensible path when it ignored merchants' practice of willfully flouting the ideal of mutual consent in this manner.¹⁹⁸ Thus, a reformation of standard form contract doctrine—to realign with objective theory—is in order. Adoption and use of section 211(3) of the Restatement would go a long way toward implementation of this goal.

VI. CONCLUSION

The objective theory of contracts is the dominant philosophy in contract law for determining mutual assent to an enforceable agreement. The reasons are clear. It is a pragmatic rule, basing the determination of mutual assent on tangible, verifiable external evidence, rather than relying on problematic proof of subjective intent. It enforces the reliance and expectation interests of the parties. And perhaps most importantly, it vindicates the freedom of contract and personal autonomy of all parties in the contracting process.

198. There is one thing I wish to mention here, and that is how the adoption of this approach might affect the doctrine of unconscionability. A fair objection to my proposal might well be that the unconscionability doctrine could already "save" consumers from the types of terms which might otherwise fail objective theory. Though this is beyond the scope of the point at hand—Restatement section 211(3) sounds in objective theory and should therefore be utilized—I should mention that, in the first place, unconscionability has not been the most reliable protection for consumers in the actual adjudication of contract disputes. See DiMatteo & Rich, *supra* note 74, at 1096–97. Nevertheless, in any event, I am proposing a reformulation of the paradigm of consumer assent to standard form contracts, and the fact that existing unconscionability doctrine may be able to reach some of these cases is not, to my mind, a compelling reason not to implement objective theory in form contract disputes. However, it may be that unconscionability still has a role to play, especially in those instances where a consumer *knowingly* agreed to some egregious term. Objective theory would not help such a consumer, but unconscionability would still be a perfect vehicle to protect the consumer if a court so warranted.

Though the objective theory of contracts is now dominant, some nagging, historical inconsistencies remain. In particular, three doctrines violate the objective theory's maxim that "objective manifestations of intent of [a] party should generally be viewed from the vantage point of a reasonable person in the position of the other party."¹⁹⁹ The dying offer rule terminates the offer on the death of the offeror, even when the offeree is completely unaware of this fact or might reasonably assume that the offeror wanted the offer to survive his death. The mailbox rule provides that, in some instances, a contract is formed immediately upon the offeree's dispatch of the acceptance, even though the offeror is unaware of the dispatch, and even though the acceptance may never actually reach the offeror. And, courts currently countenance most consumer assent to standard form contracts, even where a person in the position of the merchant would know that the consumer does not (or would not) agree to one or more terms contained in the form.

These three doctrines all have their historical rationales and justifications. However, the force of those rationales has dissipated, if they ever held substantial currency. As Oliver Wendell Holmes once stated,

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁰⁰

The rationales behind the three doctrines discussed herein are not as strong as has been historically supposed, and contract law would be better served by a recasting the doctrines in the image of the objective theory of contracts. As one early scholar put it, "There is a need for a total abandonment of the old terminology and for a consistent restatement of the law of contracts on the basis of the analysis now generally accepted and in its terminology."²⁰¹ This is the case with objective theory. Eliminating or changing the doctrines discussed in this Article would align them with objective theory, serve the greater good of reforming contract law, and vindicate the principles of freedom of contract and personal autonomy.

199. PERILLO, *supra* note 3, § 2.2, at 27 (citing *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760-61 (2d Cir. 1946) (Frank, J., concurring)).

200. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

201. Oliphant, *supra* note 24, at 201.