

Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*

INTRODUCTION

Contract law has a problem.¹ With predictable recurrence, court opinions, statutes, scholarly literature, and contract draftsmen use the words “void,” “voidable,” and “unenforceable” – as well as dozens of other terms of the same ilk – to describe flawed contracts. Yet the meaning of these declarations is persistently and maddeningly slippery. In the rare case where the precise meanings of these words are pressed into service in the courtroom, litigants are often surprised to find the court announce that a transaction formerly (and unequivocally) declared to be void is, in fact, merely voidable or unenforceable.² The scope of the problem is as widespread as it is trifled; though the distinction between void and voidable is sometimes the most important issue in contract disputes, very little serious, scholarly attention has been paid to the nature of the distinction.

Perhaps this dearth of attention can be explained by the fact that many people view the source of the problem as simply one of form. In this view, the confusion is merely a symptom of linguistic laziness. If the legal profession was to more precisely employ the proper terminology, the “problem” would fade away. For others, however, the problem springs from the nature and function of language itself. In this

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1. While the topics discussed *infra* may very likely have some application in other realms of legal theory, this Comment does not intend to embark on such an expansive undertaking. As a result, the scope of this Comment will be limited to informal commercial contracts. For an examination of the void/voidable distinction in the context of corporate stock issue, see C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable? - Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109 (2008).

2. See, e.g., *Green Tree Acceptance, Inc. v. Blalock*, 525 So. 2d 1366, 1370 (Ala. 1988) (“Although the statute states that the contract is automatically void, in practice the contract is merely voidable”); *Ewell v. Daggs*, 108 U.S. 143, 148–49 (1883) (observing that the word “void” is “often used in statutes and legal documents . . . in the sense of voidable merely . . . and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed”).

view, words are imperfect symbols that are often insufficient to fully communicate the underlying concepts. For these people, the goal is to reach past the definition of the words in order to understand what is truly meant.

This Comment will advocate the latter approach. To do so, it will first briefly explore the historical development of the concept of voidness. Second, it will detail the rise of the formalist approach, and will provide some criticism of that approach. Third, it will introduce the legal underpinnings of the functionalist approach. Finally, it will attempt to pull back the layer of legal detritus that has developed on this topic to reveal a workable and practical approach to understanding contract invalidity.

I. THE FIRST STEP IS ADMITTING WE HAVE A PROBLEM

The law is littered with confusion when it comes to the concept of voidness. Though some legal scholars trivialize the distinction between “void” and “voidable” as little more than a trap for amateurs,³ the reality is that this seemingly simple distinction has been causing grief for judges and lawyers since before the existence of the United States.⁴ The question of whether a contract, conveyance, or other legal act is void or voidable can sometimes be dispositive of an entire case; yet, for hundreds of years, the courts have lamented that “[t]he distinction between void and voidable is not as distinctly defined as could be wished.”⁵ As a result, “[c]ourts have used the words ‘void,’ ‘voidable,’ ‘invalid’ and ‘unenforceable’ imprecisely” or even interchangeably.⁶ The courts’ linguistic looseness in this context is somewhat understandable; in most cases, the distinctions between the different types of invalidity are largely theoretical, and proper classification would have no practical

3. Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts*, 93 KY. L.J. 423, 440 (2004) (“[A] somewhat metaphysical . . . quagmire for first-year contracts students.”); Rebecca A. Cochran, *Hope, Again: Hope Theory in Bar Exam Preparation*, 48 DUQ. L. REV. 513, 526–27 (2010) (“[A] topic never really understood in law school.”).

4. See, e.g., *Digges’s Lessee v. Beale*, 1 H. & McH. 67 (Md. Prov. 1726) (struggling with the issue of whether a land grant was void or voidable).

5. *Arnold v. Fuller’s Heirs*, 1 Ohio 458, 467 (Ohio 1824).

6. *Daugherty v. Kessler*, 286 A.2d 95, 97 (Md. 1972); see Abraham J. Levin, *The Varying Meaning and Legal Effect of the Word “Void,”* 32 MICH. L. REV. 1088, 1089 n.3 (1933) (collecting cases expressing a similar sentiment).

effect on a case's outcome.⁷ However, in a small minority of cases, the void/voidable distinction is the central issue; in those cases, courts have no choice but to attempt to make sense of the confusion in order to come to judgment.

A. *A Brief History of Nothing*

In ordinary usage, the word “void” means a lack of existence, a nullity.⁸ It is not a terribly troublesome concept in the abstract, and its meaning has remained remarkably consistent over time.⁹ It is, however, a very powerful word. It contemplates an absolute. Since “void” leaves so little room for nuance, the law has been compelled to recognize slightly more tempered states of nonexistence.

The English courts have recognized varying degrees of invalidity since at least the seventeenth century.¹⁰ Even under this early regime, flawed legal actions could be “void” or “voidable.”¹¹ Though these terms feel familiar to a modern lawyer, it seems that these early classifications had very little in common with the modern conceptions of void and voidable. Mathew Bacon, an influential eighteenth century legal commentator, framed the distinction this way:

A Thing is void which was done against Law at the very Time of the doing it, and no Person is bound by such an Act; but a Thing is only voidable which is done by a person who ought not to have done it, *but who nevertheless cannot avoid it himself after it is done*; though it may by some Act in Law be made void by his Heir, etc.¹²

7. In the contracts context this is because a plaintiff's suit can typically be seen as either an avoidance or a plea for the court to recognize the contract's pre-existing invalidity. Therefore, the case will usually come to the same result regardless of whether the underlying contract was void or voidable.

8. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (Anne H. Soukhanov ed., The Riverside Publishing Company 1984) (1293).

9. *Compare* Nathan Bailey, DICTIONARIUM BRITANICUM: OR A MORE COMPLETE UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY THAN ANY EXTANT (Print Ed., Gale ECCO 2010) (1730) (defining void as “empty . . . of no force or effect”) with Void – Definition and More from the Free Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/void> (last visited Oct. 27, 2010) (defining void as “containing nothing . . . of no legal force or effect”).

10. Keite v. Clopton, 124 Eng. Rep. 799, 799 (1657) (“[A]n act or thing may be said [to be] . . . void in several degrees.”).

11. *Id.*

12. 5 MATHEW BACON, A NEW ABRIDGEMENT OF THE LAW 337 (His Majesty's Law-Printers) (1766), available at <http://www.archive.org/stream/newabridgementof05baco#page/336/mode/2up> (emphasis added).

Unlike the modern formulation, it seems clear that a voidable contract (if such a concept existed at the time)¹³ could not have been avoided by any of the parties to the contract. In contrast, a void contract was perfectly valid in some contexts. The degrees of invalidity recognized by the early courts under the banner of “void” included: (1) “[a]cts that are absolutely void as to all Purposes,”¹⁴ (2) acts that are void “as to some Purposes only,”¹⁵ (3) acts that are void “as to some Persons only,”¹⁶ and (4) “[a]cts void by Operation of Law [which] may be made good by subsequent Matter.”¹⁷

B. *Two Potential Solutions to the Problem*

There are two possible ways to approach the law’s apparently confounded treatment of invalid contracts. The first, the formalist approach, is to carefully define the precise legal meaning of the words and to employ them with strict semantic discipline. The second approach is to accept that the words used to describe the legal invalidity of a contract do not (and cannot) have consistent meanings. Under this functionalist approach, the goal is not to define the terms with certainty but, rather, to look past the words to the concepts that underlie the language.¹⁸

II. THE FORMALIST APPROACH: CAGING THE BEAST

When the American Law Institute (“ALI”) formed in 1923, one of its first undertakings was to reduce the complicated, and sometimes contradictory, contracts case law into a simple and manageable text, a

13. Nearly every early case that uses the word “voidable” appears to do so in the context of land conveyances, not contracts. See, e.g., *Spalding’s Lessee v. Reeder*, 1 H. & McH. 187 (Md. Prov. 1751).

14. *Keite*, 124 Eng. Rep. at 800.

15. *Id.*

16. *Id.*

17. *Id.*

18. See *McGarry v. Village of Wilmette*, 135 N.E. 96, 98 (Ill. 1922) (“The word ‘void’ has been used so frequently by the courts, without carefully distinguishing whether it was intended to mean absolutely void or merely voidable, that the decisions and authorities must be examined with care in order to ascertain the meaning in which the word was used by the court in the particular case decided.”) (citations omitted); see also Abraham J. Levin, *The Varying Meaning and Legal Effect of the Word “Void,”* 32 MICH. L. REV. 1088, 1094 (1933) (“Efforts to distinguish between ‘void’ and phrases having a like meaning are not helpful since the approach is through definition rather than by an effort to seek out the principles governing the operation of the words.”).

restatement.¹⁹ This herculean project, which took over nine years to complete,²⁰ was led by Professor Samuel Williston of Harvard Law School. Faced with the law's careless and imprecise use of the terms signifying contract invalidity, the Restatement's drafting committee chose the formalist approach and defined the terms void, voidable, and unenforceable with great care.

The definitions chapter of the Restatement underwent six revisions before it was published.²¹ A careful comparison of the various drafts sheds light not only on the difficulty of the drafters' task, but also on the evolution of their thought process. The text defining a "void contract" is a perfect example.

In the first two drafts, "void contract" was granted its own section.²² In the second draft it was defined as "[a] promise or set of promises which produces no change in the legal relations of the parties."²³ While recognizing that the phrase was "frequently used and with different meanings,"²⁴ the drafters made it clear that the term "void contract" was a contradiction in terms under the Restatement's precise, if vacuous,²⁵ definition of a contract.²⁶ Perhaps for this reason, the text defining a void contract soon became an orphan in the drafting process, suffering the indignity of losing its own section heading, and ultimately being appended somewhat awkwardly – as a special note – to the comments of

19. RESTATEMENT OF CONTRACTS, introductory note (1932).

20. *Id.*

21. Copies of all preliminary, tentative, and proposed drafts of the first Restatement are available at <http://heinonline.org> under the American Law Institute Library. Preliminary drafts 1–4 contain the drafting committee's modifications to the definitions chapter. Preliminary draft four was submitted to the Executive Council, which made some modifications and presented it to the general membership. The final product is a result of modifications made by the general membership of the American Law Institute.

22. RESTATEMENT OF CONTRACTS § 11 (Preliminary Draft No. 1); RESTATEMENT OF CONTRACTS § 11 (Preliminary Draft No. 2, 1924).

23. RESTATEMENT OF CONTRACTS § 11 (Preliminary Draft No. 2, 1924).

24. RESTATEMENT OF CONTRACTS § 11 cmt. (Preliminary Draft No. 2, 1924).

25. The Restatement definition is somewhat conclusory, picking up after the analysis is complete. It provides little practical aid to a court or practitioner since it does not attempt to explain what *makes* a contract valid. See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 2002) (contrasting the Restatement definition with the classical view of contract law, which is more "appropriate for analytical purposes").

26. RESTATEMENT OF CONTRACTS § 1 (1932) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

another section.²⁷ In the final draft, a void contract was defined as “[a] promise or set of promises for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor.”²⁸ The clinical feel of this definition reflects the fact that it had become simply the inverse of the Restatement’s definition of a contract.²⁹ Accordingly, since the term “void contract” included only those bargains that were not contracts at all, the phrase became nothing more than an oxymoron and an intellectual faux pas.³⁰ However, despite the apparent elegance of this definitional solution, it is nonetheless a subtle shift from the original conception of a void contract because it fails to admit the possibility that a bargain might not give rise to a remedy or a legally-recognized duty, but might still have some legal effect.

In the place of void contracts, Professor Williston and the Restatement drafters erected a taxonomy of definitions; contracts that did not pass muster were either voidable, unenforceable, or validatable.³¹ Though the latter category was ultimately left on the cutting room floor, the two remaining categories – together with the Restatement definition of a contract and the status of a void contract as merely a non-contract – have become the default analytical framework for most courts. This formalist approach has become a juggernaut in contracts law.

A. *Weaknesses of the Formalist Approach*

Formal classification of invalid contracts can lead to difficulty for several reasons. First, its rigidity leaves no room for new categories of invalid contracts to be added or recognized by the law. Second, it can lead to logical inconsistencies and confusion in the gray areas between the definitions. Third, and most significantly, its success depends upon jurists adopting a uniform, puritanical commitment to absolute precision in word usage.

27. The language was added at the end of section 13. The descendent of this clause lives on in the current Restatement. See RESTATEMENT (SECOND) OF CONTRACTS § 7, cmt. a. (2008).

28. RESTATEMENT OF CONTRACTS § 13 (1932) (special note).

29. See *supra* note 24.

30. See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:20 (4th ed. 2002) (“[S]uch a promise is not a contract at all; it is the ‘promise’ or ‘agreement’ that is void of legal effect.”); see also RESTATEMENT OF CONTRACTS § 13 (1932) (special note) (stating that a non-contract is “often called a void contract . . . but this is a contradiction in terms”).

31. See RESTATEMENT OF CONTRACTS §§ 13–15 (Preliminary Draft No. 4, 1924).

1. *The Restatement Definitions Do Not Allow New Categories of Contracts to Develop*

As the law evolves, it is quite likely that new categories of flawed contracts will be discovered. For example, in cases of scribal error, courts of equity long ago assumed the common sense power to rewrite a (mis)written contract to conform to the true intent of the parties.³² This traditional class of “reformable” contracts does not fit squarely in any of the cubbyholes carved out by the Restatement definitions. Of course, a solid argument can be made that reformable contracts are merely a subcategory of valid contracts; after all, the courts are merely recognizing the true, underlying agreement, or, alternatively, the parties are simply executing their right to modify their contract.³³ However, no attempt to fit reformable contracts into the Restatement mold is likely to account for the modern expansion of the doctrine beyond innocent transcription errors. Courts have increasingly shown willingness to reform contracts that violate public policy by either using a “blue pencil” to delete offending words or simply by replacing them with terms that the court finds reasonable.³⁴ Similarly, contracts or contract terms found to be unconscionable are regularly tamed by the courts through reformation.³⁵ As the doctrine of reformability expands, it begins to look more and more like a new species of flawed contract.

While some commentators have welcomed this growing class of reformable contracts as an equal in the club of invalidity,³⁶ there is clearly no room for it in the definitions chapter of the Restatement. These contracts are not void because the law often recognizes a duty to perform the “reasonable” terms of a contract. They are not voidable because neither *party* has the power to rescind the contract or clause; rather, it is left to the discretion of the court. Finally, they are unenforceable only in the abstract sense that the court is not willing to enforce them fully according to their terms. Therefore, the fact that

32. See, e.g., *Mickelson v. Barnet*, 460 N.E.2d 566, 569 (Mass. 1984) (collecting cases); see also RESTATEMENT (SECOND) OF CONTRACTS § 155 (2008).

33. Neither argument is truly satisfying. The first runs headlong into the legal thicket of objective assent and the parol evidence rule; the second ignores the fact that, had the parties agreed to modify their contract, they would not be in court seeking reformation.

34. E. ALLEN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 561 (7th ed. 2008).

35. U.C.C. § 2-302(1) (2005).

36. JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* § 9.1 (6th ed. 2009) (stating that “the agreement may be void, voidable, or reformable”).

reformable contracts are not void, voidable, unenforceable, or completely valid highlights a weakness in the formal definitions.

2. *The Restatement Definitions Are Not Internally Consistent*

In one terse sentence, the Restatement recognizes five “typical instances” of voidable contracts: infants’ contracts; those induced by fraud, mistake, or duress; and cases involving breach of warranty.³⁷ In turn, the Restatement also discusses two types of unenforceable contracts: those that do not satisfy the requirements of either the Statute of Frauds or the Statute of Limitations, and those that “arise out of illegal bargains which are neither wholly void nor voidable.”³⁸ It is in this treatment of at least some illegal contracts as unenforceable that the formalist definitions begin to show some logical strain.

The Restatement (Second) defines an unenforceable contract as “one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.”³⁹ In other words, an unenforceable contract is identical to a void contract in all respects except that the law recognizes an abstract duty of performance in the former case. In the case law, there are typically two “other way[s]” in which the law recognizes a duty of performance without granting a remedy for breach: (1) by granting liability for tortious interference with a contract,⁴⁰ or (2) by allowing the unenforceable duty to serve as consideration for future promises.⁴¹

As commonly used, the term “illegal bargains” encompasses those purported contracts that contemplate performance in direct violation of the express language of a statute as well as those that contravene a more general public policy.⁴² The common law courts have roughly sorted illegal agreements into two categories: those that are *mala in se* (involving moral turpitude), and those that are merely *mala prohibita*

37. RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (2008).

38. *Id.* § 8 cmt. b.

39. *Id.* § 8.

40. *See, e.g.,* Daugherty v. Kessler, 286 A.2d 95, 98 (Md. 1972) (finding tortious interference where a lease did not comply with the Statute of Frauds).

41. *See, e.g.,* Graves v. Sawyer, 588 S.W.2d 542, 544 (Tenn. 1979) (finding consideration for a promise to pay a debt which was barred by the statute of limitations).

42. *See* RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, topic 1, introductory note (2008).

(relating to regulation).⁴³ Bargains in the former category are generally said to be void *ab initio*, while those in the latter category are often treated as voidable.

It seems very unlikely that the law would ever recognize a duty to perform under a bargain that is *malum in se*,⁴⁴ and it is almost certain that a court would not supply a remedy for its breach. Therefore, without so much as a passing observation, the Restatement structure appears to relegate this significant swath of illegality into the void contract category. Likewise, the Restatement recognizes that some illegal bargains are voidable.⁴⁵ Case law reveals that the most common illegal-but-voidable contracts are those that violate policies designed to protect individuals.⁴⁶ If the first category is void and the second is voidable, one is left to wonder how many illegal contracts are left which might be classified as unenforceable.

This subtle tear at the seams of the formal definitions appears even more starkly upon a careful examination of the Restatement's treatment of contract terms that are unenforceable on public policy grounds.⁴⁷ By chapter 8, the Restatement has shifted from describing unenforceable *contracts* to discussing unenforceable *promises*.⁴⁸ This is certainly a misnomer under the Restatement's definitions of "contract" and "promise." The law provides remedy for unfulfilled promises only if they form a part of a valid contract.⁴⁹ Promises, as such, are never enforceable.⁵⁰ However, this apparent sleight of hand allows the Restatement to offer the following example:

43. See 3 ERIC M. HOLMES, CORBIN ON CONTRACTS § 9.27 (Joseph Perillo, ed., rev. ed. 1996).

44. For example, would a law enforcement official be liable for tortious interference with contract if she prevented the performance of a contract killing? Could a subsequent promise to perform make the promise binding?

45. RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. b (2008).

46. See, e.g., *Farmer v. Farmer*, 528 S.W.2d 539, 541 (Tenn. 1975) ("[A]n unlicensed artisan or contractor cannot enforce his contract when the licensing statute or ordinance has been construed as a police measure.") (collecting cases supporting the proposition), *superseded by statute*, TENN. CODE ANN. § 62-6-103 (2009).

47. See RESTATEMENT (SECOND) OF CONTRACTS, ch. 8, topic 1, introductory note (2008).

48. *Id.* ("This Restatement is concerned with whether a promise is unenforceable . . .").

49. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. a (2008) ("If by virtue of other operative facts there is a legal duty to perform, the promise is a contract; but the word "promise" is not limited to acts having legal effect.").

50. See *id.* There is no mention of enforcement or remedies in the Restatement's explication of the word "promise" except in relation to a contract.

A promises to pay B \$1,000 if the Buckets win their basketball game with the Hoops, and B promises to pay A \$2,000 if the Hoops win. A state statute makes wagering a crime and provides that a promise such as A's or B's is "void." A's and B's promises are unenforceable on grounds of public policy.⁵¹

The use of quotation marks seems intended to cast doubt on the appropriateness of the hypothetical legislature's use of the word "void." However, by saying that the promises are unenforceable, the illustration appears only to imply that remedies for breach of the contract will be withheld. It is entirely unclear whether a duty of performance would be recognized either as the basis for a later tortious interference claim or as consideration for a later promise. Considering that such recognition would appear to fly in the face of the statute's express disapproval of wagering contracts, it would make more sense to refuse to grant the contract both remedy *and* recognition, thereby making it a "void contract" under the Restatement terminology. When an "unenforceable promise" can make a contract void, it is little wonder that the language has become so confused.

There is a more fundamental problem with the definitional approach. All contracts that are denied both remedy and recognition are not always treated equally. If any performance occurs before the lawsuit, the court's next step is to determine whether restitution is in order. Generally, if the court determines that the parties are equally in the wrong – *in pari delicto* – it will not grant restitution.⁵² Conversely if one party was innocent, the court will likely grant a judgment in restitution.⁵³ Regardless of how one approaches the problem,⁵⁴ one of these scenarios must logically be a legal effect of the contract. Thus, not every bargain that is remediless and which fails to create a duty of performance is void in the sense that it has no impact on the obligations of the parties. These contracts appear, at first glance, to be non-existent, but upon closer examination, have just enough legal substance to sway a

51. RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a, illus. 1 (2008).

52. *See, e.g., Jipac, N.V. v. Silas*, 800 A.2d 1092, 1096 (Vt. 2002) (outlining the traditional rule that illegal agreements are void unless the parties are not in *pari delicto*).

53. *See, RESTATEMENT OF RESTITUTION* § 3 (1937) ("A person is not permitted to profit by his own wrong at the expense of another."); *see also RESTATEMENT OF RESTITUTION* § 1 (1937) ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other.").

54. On one hand, it could be argued that the act of restoring the parties to their previous positions is a legal effect because it requires judicial intervention. On the other hand, it could also be argued that tolerating forfeiture is a legal effect because it goes against the judicial norm of restitution.

court's decision-making in some circumstances.⁵⁵ They do not leave a clean legal slate.⁵⁶

Appreciating these logical inconveniences, at least one writer has suggested that the definition of unenforceable contracts should be expanded to include all contracts for which courts will not grant remedies but which nonetheless have some legal effect.⁵⁷ The problem with pulling on this thread is that it unravels the whole cloth. By proposing that a contract ought to be defined as any bargain having legal effect – and that such legal effect might include more than remedies or duties – the Restatement's definition of contract is overtaxed. Either the definition of “contract” must be reworked, or it must be accepted that there are “void contracts” that have some legal effect.

3. *Technical Meanings of the Words Are Not Commonly Employed*

By far the most damning critique of the formalist approach is that courts do not seem to follow it. The Restatement (Second) concedes that it is at least “arguable that . . . difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined.”⁵⁸ It is the second half of this enterprise that has proven to be the most toilsome. As mentioned earlier, courts and legislatures often simply do not need to be precise in their treatment of non-dispositive concepts.⁵⁹ So they are not.

This persistent imprecision, coupled with the apparent simplicity of the formalist approach, heightens bewilderment in the legal classroom and causes a circus of sorts in the courtroom. Emboldened by the false sense of certainty granted by the Restatement definitions, litigants often bring claims that, to a layperson, would appear absurd.⁶⁰ Courts,

55. *Daugherty v. Kessler*, 286 A.2d 95, 97 (1972) (“[Contracts] may be unenforceable as between the parties but . . . may in various aspects have life, force and effect.”).

56. Contrast this with a void contract, which is treated “as if it never existed.” *Laborers' Pension Fund v. A & C Envtl.*, 301 F.3d 768, 779 (7th Cir. 2002).

57. See Sergey Budylin, *A Comparative Study of the Non-Existent: Contract Invalidity in the U.S. and Russia*, 15 CURRENTS: INT'L TRADE L. J. 28, 33 (2006) (“[D]enial of restitution in the case of a contract is [sic] unenforceable on public policy grounds . . . can hardly be regarded as an indication to a legally recognizable ‘duty to perform’ the illegal promise.”).

58. See RESTATEMENT (SECOND) OF CONTRACTS, ch. 1, introductory note (2008).

59. See *supra* note 7.

60. See, e.g., *Romm v. Flax*, 668 A.2d 1 (Md. 1995). In this case, the contract for sale of a home stated: “If the disclosure statement is delivered by the Seller later than three (3) days after the Seller enters into a contract of sale with the Purchaser, the contract is void.” *Id.* at 2. The seller failed to timely deliver the disclosure statement as

therefore, are often faced with the unhappy choice between applying the literal meaning of the words (and coming to an inequitable result), making a fair decision only by distinguishing the case on a trivial point (and thus complicating the law further), or admitting that the precedent or statute in question does not mean what it says (thereby baffling the bar). As we shall see in the next section, this is a false dilemma that is an outgrowth of the mistaken but widely-held belief that formalism is the proper way to approach the issue of voidness.

III. THE FUNCTIONALIST APPROACH: STUDYING THE PROBLEM IN THE WILD

The seeds of the functionalist approach were sown by Oliver Wendell Holmes in his renowned work, *The Common Law*.⁶¹ The future Supreme Court Justice recognized as void those agreements which lacked the essential elements of a contract – and therefore never legally existed as a contract.⁶² However, he opined that voidable contracts were those that could be “unmade at the election of one party . . . because of the breach of some condition attached to [the contract’s] existence either expressly or by implication.”⁶³ Holmes went on to describe a condition as follows:

[A]n event, the happening of which authorizes the person in whose favor the condition is reserved to treat the contract as if it had not been made, – to avoid it, as is commonly said, – that is, to insist on both parties being restored to the position in which they stood before the contract was made.⁶⁴

Under Holmes’s approach, different types of contracts were not inherently voidable based on their character, but, rather, avoidance is merely the result of one party taking advantage of a pre-existing, favorable condition.

In 1933, just one year after the publication of the Restatement, a Michigan lawyer named Abraham Levin built upon Holmes’s framing of the issue,⁶⁵ going the further step of recognizing “an element of similarity

required, but sought thereby to get out of the contract over the buyer’s objection. *Id.* The fact that the seller’s argument was successful in the trial court highlights the bizarre results that commonly result from strict application of the formal definitions.

61. O. W. HOLMES, *THE COMMON LAW* (Little, Brown, and Company 1881).

62. *Id.* at 308.

63. *Id.* at 315 (emphasis added).

64. *Id.* at 318.

65. Abraham J. Levin, *The Varying Meaning and Legal Effect of the Word “Void,”* 32 MICH. L. REV. 1088, 1091 (1933) (quoting Holmes).

and common meaning” between the words void and voidable.⁶⁶ While affirming the pure meaning of the word void – that which has no legal effect whatsoever – Levin accepted that, in ordinary usage, the word usually only “implies some *degree* of nullity or weakness in a transaction.”⁶⁷ With regard to contracts, he stated:

The word “void” is frequently used in court opinions in referring to the rights of infants to avoid contracts during minority, contracts of insane persons, married women, the right to avoid contracts obtained by fraud, acts beyond statutory authority, *ultra vires* acts, and in many other situations. In all such cases, although the term may be used without qualification, the courts interpreted the legal effect of the word to be that a certain party (we include the State as a party in the broad sense) can avoid.⁶⁸

In sum, the functionalist approach attempted to make sense of the madness by presuming that void very rarely meant void; most of the time, it meant voidable. Echoing the English courts nearly three hundred years earlier, both Levin and Holmes recognized that contracts could have no legal effect as between some people and for some purposes, while retaining legal substance in other contexts. A court’s job, therefore, was to discover, based on the language of the contract and the surrounding circumstances, who was to be benefited or protected by the contract’s voidability and why.

Levin’s astute observation that void and voidable are concepts that are inherently tied together, as well as his parenthetical recognition that the State (representing, of course, society at large) could be the beneficiary of the voidness condition in some circumstances, are strokes of brilliance that could have served to animate the otherwise embryonic functionalist approach. Instead, the budding system of determining what the courts and legislatures *mean* in their discussion of invalid contracts appears to have been largely abandoned in the shadow of the more popular endeavor of defining what they say. The legal system is worse for it.

A. *Problems with the Functionalist Approach*

The most obvious and debilitating problem with Holmes’s condition-based approach to voidable contracts is that not all voidable contracts involve conditions as traditionally understood. Holmes was

66. *Id.* at 1090.

67. *Id.* at 1094.

68. *Id.* at 1096.

influenced heavily by Christopher Columbus Langdell, a former dean of Harvard Law School and the father of the case method and anonymous grading.⁶⁹ Langdell's treatment of conditions is therefore useful in understanding Holmes's perspective on the issue.

According to Langdell, "[A] . . . promise is conditional when its performance depends upon a future and uncertain event."⁷⁰ A condition had to be an event that could occur after the formation of a promise, but before its complete performance.⁷¹ Adopting the accepted parlance of the day, Langdell also drew a distinction between conditions precedent and conditions subsequent: "[I]n the case of a condition precedent, the covenant or promise is not to be performed *unless* the event happens; while, in the case of a condition subsequent, it is not to be performed *if* it happens."⁷² The existence of a condition was based on the intent of the parties, whether express or imputed by the law.⁷³ Of course, since the condition protected only the benefited party's obligation from arising and had no impact on the other party's obligation, the beneficiary of the condition had the option to insist upon the other's performance, thereby relinquishing the benefit of the condition.

In this sense, Holmes's conditional approach contemplated that the conditions, and thus the voidability of the contract, were rooted firmly in the parties' intent. While this approach works satisfactorily to explain why contracts containing a warranty are considered voidable, it does little to explain contracts voidable entirely by the operation of a rule of law (e.g., contracts with an infant). However underinclusive, Holmes's approach has further significance because it also has a subtly hybrid nature. By recognizing that voiding a contract would return the parties back to their pre-contract position,⁷⁴ he contemplated that the execution of a condition would not only be a bar to a contract's performance, but

69. See Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1756 (2000) ("[M]uch of Langdell's substantive analysis lived on in Holmes's contract theory."). But see R. Blake Brown & Bruce Kimbell, *When Holmes Borrowed from Langdell: The "Ultra Legal" Formalism and Public Policy of Northern Securities (1904)*, 45 AM. J. LEGAL HIST. 278 (2001) ("With the recent exception of Patrick Kelley, no scholar suggests that Holmes was actually *influenced* by Langdell's legal doctrine . . ."). However, regardless of the academic debate regarding the influence Langdell had on Holmes's theory, it is undisputable that Holmes cites extensively to Langdell's work.

70. C. C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 31 (2d ed. 1880).

71. *Id.* at 33.

72. *Id.* at 35–36.

73. *Id.* at 134.

74. O. W. HOLMES, *THE COMMON LAW* 318–19 (1881).

also the end of the contract. If any benefit had transferred by part performance before the avoidance, the equitable doctrine of restitution would likely be triggered.⁷⁵

IV. THE MODERN POTENTIAL OF THE FUNCTIONALIST APPROACH

The formalist approach is too rigid. The functionalist approach is underdeveloped and underinclusive. It is little wonder that this area of the law, though arguably critical to a complete understanding of contracts, is riddled with confusion and uncertainty and prone to seemingly contradictory holdings. A more complete exploration of the functionalist approach might bring the case law into harmony, provide much insight into the nature of void and voidable contracts, and grant some predictability to practitioners in a field that currently seems to be dominated by *ad hoc*, categorical assignment. There are two premises that are essential to this process.

First, it must be recognized that the court concerns itself not only with conditions that the parties intend to attach to the *performance* of their promises, but also routinely recognizes conditions created by law which affect the State's willingness to *enforce* certain contracts.⁷⁶ Indeed, the very concept of a contract can be understood in this light: a contract can be seen as that entire class of promises that satisfy a state's conditions precedent to enforcement. Since it is impracticable and undesirable for the State to enforce all promises, every society must decide which unfulfilled promises are worthy of applying force to remedy. Each legal system does so by establishing some set of circumstances that must exist prior to enforcement.⁷⁷ These conditions benefit the State – and by extension, society – by creating a manageable case load while at the same time establishing a fair degree of certainty and predictability in the economic affairs of its citizens.

75. See *supra* note 53.

76. Take, for example, the prohibition against illegal contracts. See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12:1 (4th ed. 2002) (“Bargains that comply with formal contractual requirements may nevertheless be unenforceable either by operation of express statutory prohibition or by operation of common law as being opposed to public policy.”).

77. Though our current legal system focuses primarily on consideration as the talisman that activates the State's willingness to enforce, it is not necessarily the only condition which separates enforceable promises (i.e., contracts) from unenforceable promises. For example, history has shown that this function can also be served by the seal or by reliance. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 310–14 (1986) (exploring the development of the various consideration substitutes).

These supra-conditions upon enforcement are fundamentally different in kind from traditional contractual conditions because they are not based on the parties' intent, but rather on the policy and will of the sovereign. The existence of these conditions makes sense of otherwise logically inexplicable rules of contract law that can defy the intent and expectations of the parties (e.g., infancy, unconscionability, and impracticability).

The second premise of the functionalist approach is that void, voidable, and unenforceable are not separate ideas capable of being independently defined, but, rather, are different facets of the same, undivided concept. The concept, as Holmes correctly surmised, is very much akin to a condition. However, as discussed earlier, the condition is not always attached to the parties' obligations, but sometimes is attached directly to the State's enforcement and recognition.⁷⁸

Where these doctrines of conditional enforcement have developed, either by statute or in the case law, two distinct types of supra-conditions can be found: those that benefit the State or society in general, and those that protect individuals.⁷⁹ The party protected by the option may elect whether it wishes to take advantage of the condition, thereby stripping the promise of any legal force and effect, or to waive the condition and enable enforcement. In this way, all invalid contracts can be considered voidable by someone; contracts that are traditionally considered void *ab initio* are simply those that the State, acting through the courts, will predictably and consistently elect to avoid by availing itself of enforcement conditions that are in its favor. In other words, conditions which benefit the State will, by tradition and the force of *stare decisis*, be rendered "void" by default. However, conditions (whether on obligation or enforcement) which benefit any of the parties to the contract will remain voidable until such an election is made.

Adoption of the preceding theory yields a rough analytical framework that a court may use to determine the effect of a clause or rule of law that affects a contract's validity. Since "void," "voidable," and "unenforceable," all represent the same concept, it does not matter which word is used. The first step that a court should take is determining whether the condition is on performance or on enforcement. The second step is determining who is benefited by the contract's purported invalidity – that is the entity (either a party or the State) that has the

78. See *supra* note 76.

79. For example, the former category would include the prohibition against wagering contracts, while the latter category would include the law's treatment of contracts formed by an infant.

power of avoidance. The third step is determining *why* the party is benefited by the condition, the purpose. In this way, a court may roughly sketch the scope of the power of avoidance and whether the ability to activate that power rests with either of the parties or with the State.

V. CONCLUSION

The legal profession has long labored under the unworkable belief that all invalid contracts must be categorically and mechanically defined as void, voidable, or unenforceable. While this limited vocabulary may serve as useful shorthand for *how* flawed contracts are classified, it does nothing to explain *why* those classifications are proper. Without a closer examination of the theoretical underpinnings of this critical area of contract law, courts and lawyers will continue to engage in the unpredictable game of labeling and re-labeling contracts, case by case. However, by recognizing the conditional nature of voidness and by admitting that some policing rules are for the exclusive benefit of the State, the law might be able to move past its unproductive adherence to formal definitions in order to more fully understand the underlying purpose and function of the rules and clauses that serve to circumscribe valid, enforceable contracts.

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