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Contract Lore as Heuristic Starting Points

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Contract Lore as Heuristic Starting Points

Colin P. Marks*

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I. INTRODUCTION

It is an honor to be invited to write on Professor Hillman's iconic article on contract lore.¹ Professor Hillman's original article,² and his

* © 2020 Colin P. Marks. Ernest W. Clemens Professor of Law, St. Mary's University School of Law. I would like to thank and acknowledge the hard work and contributions of my research assistants Lucie Arvallo, Dominic Castillo, Lance Kimbro, Emily Reed, Katherine Spiser, and Diana Valdez in researching and writing this Article. I would also like to thank my wife Jill, daughter Savannah, and son George for their love and support. Finally, I would like to thank Tulane Law School for hosting the 2019 International Conference on Contract Law, and particularly Mark Wessman for his spectacular job in organizing the event, and the *Tulane Law Review* for inviting me to publish this piece.

1. Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505 (2002) [hereinafter Hillman, *Lore I*].

2. *See id.*

follow-up,³ asks contracts scholars and experts (collectively “contracts people”) to question the very foundations of what we seemingly all accept as true.⁴ In what he labels “contract lore,” contracts people are perpetuating myths about the true state of contract law and the realities of what actually happens.⁵ To explain this, Professor Hillman hypothesizes that contract lore may represent the aspirations of contracts people as to what the law should be and that our persistent recitation of this lore can be explained as a form of cognitive dissonance.⁶ In *More Contract Lore*, Professor Hillman admits that there may be other explanations, but cognitive dissonance remains the primary explanation.⁷

Respectfully, I disagree with Professor Hillman that all of the examples he gives are “lore,” or at least I think that the term is scalable. Some of the instances, such as the importance of the intent of the parties, I would label as more truth than myth, but other instances, such as expectation damages putting the aggrieved party in the position they would have been absent a breach, I think are unquestionably myths. Similarly, I find that these statements of lore really reflect the ambitions of what the law should be in the mind of contracts people not completely convincing, but also scalable. Interestingly, these appear to have an inverse relationship with the lore scale—thus the lore I find to be the most aspirational, the importance of the intent of the parties, is also the least lore-like, and vice versa with regard to expectation damages. As I do not find all of the examples to fit neatly into lore or aspirations, I find cognitive dissonance unsatisfying as an explanation for the persistence of this lore, but that does not mean I disagree with the observations about this telling us something about law reform. Indeed, I think Professor Hillman has provided us with a useful device by which to judge whether the law is in need of reform. A statement of law that is high on the lore scale, but low on the aspiration scale, should cause all contracts people to question the value of the statement, but I don’t think cognitive dissonance is a satisfactory explanation for all of the lore Professor Hillman lists.

Instead, I propose that what Professor Hillman labels as lore is better thought of as a series of heuristic starting points. I do not label

3. See Robert A. Hillman, *More Contract Lore*, 94 TUL. L. REV. 903 (2020) [hereinafter Hillman, *Lore II*].

4. See Hillman, *Lore I*, *supra* note 1, at 505.

5. *Id.*

6. *Id.* at 515-17.

7. See Hillman, *Lore II*, *supra* note 3, at 914.

them heuristics in and of themselves as they do not represent shortcuts to the ultimate answer. But as I explain, all of the areas that Professor Hillman identifies as lore are actually quite nuanced, sometimes filled with exceptions, but other times they simply represent the first step in a long inquiry. Heuristics as a teaching device has been recognized in law and other disciplines as an effective tool in not only conveying information, but also prodding the student to conduct further inquiry. Thus, the persistence of lore may reflect nothing more than the need to have a starting point for a legal analysis, be it by a student, lawyer, or judge.

II. LORE, ASPIRATION, OR SOMETHING ELSE

Many of Hillman's observations are well-known to contracts people. Professor Hillman asserts that these are examples of contract lore in that they do not comport with what really happens, thus calling into question why those familiar with contract law keep saying them.⁸ His conclusion is that these are primarily statements of aspirations and that cognitive dissonance can explain why contracts people keep restating these obvious false statements of law.⁹ While I agree that many of these observations represent some degree of "loreness," each observation is more complicated than implied by simply labeling them all lore. Below I examine the "loreness" of each observation, placing them on a spectrum of least-to-most lore-like.

A. *Intent of the Parties*

1. Objective Theory Is Always Taught as the Manifestation of Intent

Hillman asserts that it is lore that we primarily care about the intentions of the parties in contract formation and interpretation, but I disagree with him in so far as he labels this "lore."¹⁰ It is true that this may be an aspiration—we think contract formation should be based on the intent of the parties, but none of us are psychic. In an ideal world, juries would be able to look into the hearts and minds of the litigants and know what the agreed upon meaning of contract terms are at the time the contract was made. But given humanity's lack of extrasensory perception, we must rely on evidence of intent.

8. Hillman, *Lore I*, *supra* note 1, at 505.

9. *Id.* at 515-17.

10. *Id.* at 505-06, 511.

Many basic rules of contract law are, therefore, built upon the objective theory of contract. This is not a new phenomenon: as Oliver Wendell Holmes noted in 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.”¹¹ This has been true in contract formation and interpretation as embodied by the Restatement (Second) of Contracts. On formation, section 17 states: “(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a *manifestation of mutual assent* to the exchange and a consideration.”¹² Section 200 defines interpretation of a promise as being “the ascertainment of its meaning,”¹³ and in the comments notes that, just as with formation “the intention of a party that is relevant . . . is the intention manifested by him rather than any different undisclosed intention.”¹⁴

Perhaps the most famous example of the intentions of the parties not controlling is the iconic and beloved case of *Lucy v. Zehmer*.¹⁵ Lucy wished to purchase Zehmer’s farm, but Zehmer had refused on previous occasions.¹⁶ Then, one night after both men had imbibed quite a few drinks, Lucy asserted that Zehmer wouldn’t even take \$50,000 for the farm.¹⁷ Zehmer apparently decided to play along and asserted he would, and the two men drew up a makeshift contract on a guest check that read, “We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer.”¹⁸ Zehmer had his wife also sign the guest check but told her out of Lucy’s earshot that it was just a joke.¹⁹ When Lucy later attempted to enforce the contract, the Zehmers argued in court that they were only joking and that the contract should not be enforced.²⁰ On appeal, the court disagreed, finding that though the Zehmers may have intended the offer as a joke, the court held that it “must look to the outward expression of

11. O.W. HOLMES, JR., *THE COMMON LAW* 309 (Boston, Little, Brown, & Co. 1881); *see also* ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 46 (4th ed. 2019) (“[U]nder the objective test of assent, contract law generally enforces the apparent, not necessarily real intention of the promisor.”).

12. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) (emphasis added).

13. *Id.* § 200.

14. *Id.* § 200 cmt. b.

15. *See* 84 S.E.2d 516 (Va. 1954).

16. *Id.* at 518.

17. *Id.* at 518-19.

18. *Id.* at 517-18.

19. *See id.* at 519, 522.

20. *Id.* at 517, 520.

a person as manifesting his intention rather than to his secret and unexpressed intention.”²¹ As the written guest check suggested a serious business transaction with no outward signs that it was intended in jest, the court held that the Zehmers were bound by the agreement.²²

The case of *Lucy v. Zehmer* is taught throughout the country to first year law students as a warning that it is the manifestation of intent that controls under the objective theory. That the case has achieved such iconic status in contract lore would suggest that every serious contracts person knows that the intention of the parties is not controlling. Thus, the “lore” that we care about the intention of the parties isn’t really the lore at all. I would suggest that instead, what is lore is the primacy of the written expression over the actual intentions of the parties.

2. Intent Is Only an Issue when Parties Disagree

The above is not meant to imply that intent is irrelevant. Quite the contrary, we use the objective theory and the manifestations of intent to glean what the intent of the parties actually is. Even when the objective evidence seems to point to a serious contract being formed, if both parties agree that the contract is a joke, then neither party would be bound. For instance, if Lucy had known from the context that the two of them were just speaking in jest, even the staunchest objectivist would not bind the two parties.²³

Further, intent means a great deal to the parties at issue and frequently contracts do embody the intent of the parties. It is only when the parties disagree as to whether a contract is formed or what a term means that we must engage in the exercise of determining intent based upon the objective evidence available. The offer-acceptance model is a good example of the role intent plays.

The Restatement standard for “[a]n 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.”²⁴ Intent is seen in the word “willingness,” but as already

21. *Id.* at 521-23 (quoting *First Nat. Exch. Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937)).

22. *Id.* at 521-22.

23. *See id.* at 522-23; *see also Kolodziej v. Mason*, 774 F.3d 736, 745 (11th Cir. 2014) (“Under the objective standard of assent, we do not look into the subjective minds of the parties; the law imputes an intention that corresponds with the reasonable meaning of a party’s words and acts.”).

24. RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981); *see also In re First Capital Life Ins. Co.*, 40 Cal. Rptr. 2d 816, 818-20 (Ct. App. 1995) (holding where a

noted, this is modified by the word “manifestation.” Acceptance of an offer, the Restatement tells us, “is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”²⁵ Intent is expressed by use of the word “assent” again modified with “manifestation.” The clearest case would be where the objective manifestations match-up with the parties’ intent, such as with a clear written offer and reciprocal and unequivocal acceptance. But when the communications are less than clear, courts must discern the intentions of the parties and whether they intended to be bound to one another. A frequent fact pattern that arises involves price quotations.²⁶

Typically, price quotations are not offers,²⁷ but they can, in some circumstances, rise to the level of an offer if the quote is specific, uses

letter sent in error, if a reasonable person believes that the offeror manifested a willingness to be bound and a mode for the offeree to accept, can constitute “an offer to continue a contract”); *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1229-30 (Del. 2018) (“[I]n applying th[e] objective test for determining whether the parties intended to be bound, the court reviews the evidence that the parties communicated to each other up until the time that the contract was signed—*i.e.*, their words and actions—including the putative contract itself.”); *City of Houston v. Williams*, 353 S.W.3d 128, 144 (Tex. 2011) (holding that a statute could be incorporated by reference into a contract if “sufficient manifestation of an intent to be *contractually bound*” is made by a municipality in a manner that communicates an offer).

25. RESTATEMENT (SECOND) OF CONTRACTS § 50; *see also In re Cranberry Growers Coop.*, 588 B.R. 50, 55 (Bankr. W.D. Wis. 2018) (holding where an offeree makes a manifestation of assent to be bound to a binding and enforceable contract, the terms in the contract are controlling).

26. *Nordyne, Inc. v. Int’l Controls & Measurements Corp.*, 262 F.3d 843, 846 (8th Cir. 2001) (explaining that factors used to determine if “a price quotation is an offer include the extent of prior inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom the price quotation is communicated” (citing RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. c)). In this case the offeror had sent a price quote after many months of negotiation. *Id.* The quote included price, quantity, time to accept, and requested a signature of acceptance. *Id.* The offeree’s argument that because the quote lacked definite quantity it was not a quote was rejected by the United States Court of Appeals for the Eight Circuit based on the performance of each party in honoring the terms of the quote up until the dispute. *Id.* at 846-47; *see also RPTS, Inc. v. FMC Tubular & Equip. Corp.*, Nos. 11CA0001-M, 11CA0018-M, 2012 WL 366876, at *1 (Ohio Ct. App. 2012) (“[T]he determination of the issue depends primarily upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances.” (quoting *Dyno Constr. Co. v. McWane, Inc.*, 198 F.3d 567, 572 (6th Cir. 1999))); *Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc.*, 814 A.2d 217, 222-23 (Pa. Super. Ct. 2002) (discussing the factors that caused a price quote to rise to the level of an offer that included an unequivocal quotation, definite terms, and other actions that constituted an objective manifestation of assent).

27. *See J.D. Fields & Co. v. U.S. Steel Int’l, Inc.*, 426 F. App’x 271, 276 (5th Cir. 2011) (“Generally, a price quotation . . . is not considered an offer, rather, it is typically viewed as an invitation to offer.”); *White Consol. Indus. v. McGill Mfg. Co.*, 165 F.3d 1185, 1190 (8th Cir. 1999) (“Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract.”).

unequivocal language, and makes clear how to accept.²⁸ When a price quote is given, a purchase order follows, and then performance, the question may arise as to whether the price quote is an offer accepted by the subsequent purchase order, or if it is truly a solicitation of an order, in which case the purchase order is the offer accepted by conduct.²⁹ The resolution of the question is often key in resolving issues such as the scope and extent of warranties and limitations on damages.³⁰ In resolving such issues, courts frequently look to the context of the negotiations to glean the intent of the parties.³¹

Furthermore, intention is highly relevant where silence is being used as the mode of acceptance. Generally, silence or inaction cannot form the basis of a valid acceptance, but exceptions do exist.³² For instance, accepting “the benefit[s] of [a] service[] with reasonable opportunity to reject them and reason to know that they were offered

28. See *J.D. Fields & Co.*, 426 F. App'x at 278 (noting that courts have found price quotes rising to the level of offers if it is detailed enough, does not limit acceptance, and contains specific, material terms); *Nordyne*, 262 F.3d at 846 (“Factors relevant in determining whether a price quotation is an offer include the extent of prior inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom the price quotation is communicated.” (citing RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. c)).

29. See *Babcock & Wilcox Co. v. Hitachi Am., Ltd.*, 406 F. Supp. 2d 819, 830 (N.D. Ohio 2005) (finding that the price quotations sent over a long series of negotiations were not offers; instead the purchase order was the offer and subsequent acceptance was evidenced by shipping goods).

30. See, e.g., *id.* at 830-32 (looking to the purchase order to determine which warranties apply and finding the purchase orders incorporate by reference some of the warranties documented in prior negotiations).

31. See, e.g., *Mead Corp. v. McNally-Pittsburg Mfg. Corp.*, 654 F.2d 1197, 1200-04 (6th Cir. 1981) (finding a bid proposal was an offer based on the oral negotiations that showed the intention of the parties to be bound); *Babcock & Wilcox Co.*, 406 F. Supp. 2d at 828 (holding that a court’s main focus when determining a price quote rising to the level of an offer, should be a focus on the intention of the parties based on a totality of the circumstances); *All. Laundry Sys. LLC v. Stroh Die Casting Co.*, 763 N.W.2d 167 (Wis. Ct. App. 2008) (reversing and remanding a case to the fact finder to determine the intent of the parties where both the price quotation and the purchase order were deficient to constitute as a matter of law an offer in order to determine warranty terms).

32. See *Bauer v. Qwest Commc’ns Co.*, 743 F.3d 221, 229-30 (7th Cir. 2014) (affirming that despite the lack of a required signature for a settlement agreement, the conduct and failure to respond to a document that stated silence was acceptance of a final agreement, a party was bound by the agreement); *White v. Nat’l Football League*, 92 F. Supp. 2d 918, 920, 924 (D. Minn. 2000) (holding that where an agent of an NFL player silently reaps the benefits of the Collective Bargaining Agreement (CBA), they are bound by the obligations imposed under the CBA); *Vogt v. Madden*, 713 P.2d 442, 444-45 (Idaho Ct. App. 1985) (applying the two silence as acceptance exceptions under section 69 of Restatement (Second) of Contracts: “those where the offeree silently takes offered benefits, and those where one party relies on the other party’s manifestation of intention that silence may operate as acceptance” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a)).

with the expectation of compensation” will qualify as an acceptance.³³ This would seem to be based on the fact that by staying silent the offeree intended to form a contract.³⁴ Section 69 of the Restatement lays out intent as a specific way to accept by silence, stating there is acceptance “[w]here the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.”³⁵ Of course, proving intent will still be an issue, but once again we see a standard that turns on the intention of the parties.

In a similar vein, preliminary agreements raise issues of intent. Two parties may enter into negotiations, sometimes over an extended period of time. Both parties may even move forward as if there is a contract, even though the final writing is still forthcoming. In such situations, when the relationship breaks down prior to this final writing, courts must decide if the parties have nonetheless bound themselves to a contract. In doing so, courts consider factors such as “whether there [has been] an express reservation . . . not to be bound,” part performance, “whether all of the [relevant] terms . . . have been agreed upon,” the context, and whether it is typical for a further writing to be entered into.³⁶ All of these factors, however, are really just ways of

33. RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a); *see also* Weichert Co. Realtors v. Ryan, 608 A.2d 280, 285 (N.J. 1992) (“[C]ourts have held that when an offeree accepts the offeror’s services without expressing any objection to the offer’s essential terms, the offeree has manifested assent to those terms.”).

34. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. c (“The mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting. But the offeree is entitled to rely on such a statement if he chooses.”); *see also* Walshe v. Zabors, 178 F. Supp. 3d 1071, 1081-82 (D. Colo. 2016) (holding for the purposes of surviving summary judgment that conduct by one party could support an implied contract to create a partnership based on evidence the party took advantages of benefits outside of an express employment contract).

35. RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(b); *see also* James v. Glob. TelLink Corp, 852 F.3d 262, 266 (3d Cir. 2017) (“‘Silence does not ordinarily manifest assent, but the relationships between the parties or other circumstances may justify the offeror’s expecting a reply and, therefore, assuming that silence indicates assent to the proposal.’ Nevertheless, the offeror must ‘give[] the offeree reason to understand that assent may be manifested by silence or inaction.’” (citation omitted) (first quoting *Weichert Co. Realtors*, 608 A.2d at 284; and then quoting RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(b)); *Lexington Ins. Co. v. Lindahl Constr. & Eng’g, Inc.*, 47 P.3d 1081, 1086-87, 1087 n.15 (Alaska 2002) (“We have also held that silence operates as acceptance of an agreement only in cases where a party has ‘reason to understand that assent may be manifested by silence . . . , and the [party] in remaining silent . . . intends to accept the offer.’” (quoting *Brady v. State*, 965 P.2d 1, 9 (Alaska 1998))).

36. *See* *Brown v. Cara*, 420 F.3d 148, 154 (2d Cir. 2005) (“There are four factors relevant to determining whether a preliminary agreement is enforceable as to the ‘ultimate contractual objective’: (1) whether there is an expressed reservation of the right not to be bound

helping the court determine the only thing that matters in such a situation—did the parties *intend* to be bound to one another in contract.³⁷

3. Contextual Approach to Contract Interpretation Recognizes the Harshness of a Strict Objective View

Too strict an adherence to the written document has spurred concerns that injustices may be perpetuated under the objective theory of contract. Thus, the objective theory asks not what a detached reasonable person would think a contract means, but what a reasonable person in the same situation would think.³⁸ Similarly, the parole evidence rule allows in contextual evidence when the judge finds the contract to be partially integrated or ambiguous, and in some jurisdictions, the court will invite such contextual evidence as part of its deliberation on the issue of ambiguity and integration.³⁹ As Chief

in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.”); *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 408 (4th Cir. 2002) (“Among the circumstances which may be helpful in determining whether this type of agreement has been made are 1) whether there has been an express reservation of the right not to be bound in the absence of a writing, 2) whether there has been partial performance of the contract, 3) whether all of the terms of the alleged contract have been agreed upon, and 4) whether the agreement at issue is the type of contract that is usually committed to writing.”); *Miller v. Flegenheimer*, 161 A.3d 524, 529 (Vt. 2016) (“[I]n the absence of a fully executed document, we apply a four-factor test to determine whether parties intended to be bound: ‘(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.’” (quoting *Catamount Slate Prods., Inc. v. Sheldon*, 845 A.2d 324, 329 (Vt. 2003))).

37. See *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 408 F.3d 460, 465 (8th Cir. 2005) (“To assess whether the parties have demonstrated an intent to be bound by a Type I agreement, a court considers (1) the language of the agreement; (2) the existence of open terms; (3) whether there has been partial performance; and (4) whether the agreement is of the type usually committed to writing.” (quoting *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 295 F. Supp. 2d 1063, 1070 (D. Minn. 2003))); *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1239 (D.C. 1995) (“[P]arties will not be bound to a preliminary agreement unless the evidence presented clearly indicates that they intended to be bound at that point.”); *Cochran v. Norkunas*, 919 A.2d 700, 708 (Md. 2007) (“Courts and commentators have identified several factors that may be helpful in determining whether the parties have manifested an intention to be bound.”).

38. See *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968); *Cochran*, 919 A.2d at 710.

39. See, e.g., *Pac. Gas*, 442 P.2d at 644.

Justice Traynor of the California Supreme Court noted in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*:

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. . . . Accordingly, the meaning of a writing “* * * can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended”

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms.⁴⁰

This approach has been embraced in many jurisdictions as a method of determining the intention of the parties when words are used in a contract.⁴¹ This approach is explicitly adopted in the comments to section 2-202 of the U.C.C. as well, which states:

This section definitely rejects: . . . (b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and (c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.⁴²

In sum, the lore surrounding the parties' intent is actually quite complicated. At most, we have a starting assumption about intent, followed by a method to discern intent that has been modified to reflect that the objective theory is imperfect. But this does not mean we don't give primacy to the parties' intent. Rather, it simply recognizes that judges and juries are not mind readers and that contextual tools must be used to discern intent.

40. *Id.* at 644-45 (quoting *Universal Sales Corp. v. Cal. Press Mfg.*, 128 P.2d 665, 679 (Cal. 1942) (Traynor, J., concurring)).

41. See RESTATEMENT (SECOND) OF CONTRACTS § 212 (AM. LAW INST. 1981).

42. U.C.C. § 2-202 cmt. (AM. LAW INST. 2011) (Purpose 1).

B. *Willful Breach*

While the lore of intent may not quite qualify as true lore, Hillman's assertions about willful breach come closer to lore. It is probably closer to true that contracts people believe that generally the reason for the breach is irrelevant—if you breach a contract, you will be liable.⁴³ This is false if we take it to mean that willfulness is irrelevant to the amount of damages, so perhaps this bit of lore is more of a half-truth. It is generally true with regard to liability, but not amount. Professor Hillman offers materiality as evidence of why willfulness matters, which I expand on below.

1. Materiality

Professor Hillman properly points to materiality as a concept where willfulness is taken into account.⁴⁴ As noted in the Restatement:

§ 241 Circumstances Significant in Determining Whether a Failure Is Material

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform *comports with standards of good faith and fair dealing*.⁴⁵

While good faith and fair dealing are not necessarily equated with willfulness, an intentional breach would seem to fail to meet this standard.⁴⁶

43. See Hillman, *Lore I*, *supra* note 1, at 506, 509.

44. See *id.* at 509 & n.9.

45. RESTATEMENT (SECOND) OF CONTRACTS § 241 (emphasis added).

46. See *Designer Direct, Inc. v. DeForest Redev. Auth.*, 313 F.3d 1036, 1046-47 (7th Cir. 2002) (“Wisconsin law defines good-faith conduct in the negative: ‘Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of

If a breach is intentional, there could be an effect on the damages. To understand why, we must consider what the breaching party is entitled to in a situation in which a breach is material versus a case of substantial performance. In a material breach situation, the breaching party is not entitled to recover the contractually agreed upon amount,⁴⁷ and in some jurisdictions is precluded to any recovery at all,⁴⁸ though

bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” (quoting *Foseid v. State Bank of Cross Plains*, 541 N.W.2d 203, 213 (Wis. Ct. App. 1995)); *First Interstate Bank of Idaho v. Small Bus. Admin.*, 868 F.2d 340, 344 (9th Cir. 1989) (“The bank’s covert evasion of its bargained-for performance failed completely to comport with ‘standards of good faith and fair dealing’ as we understand them.” (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241(e))). In *First Interstate Bank of Idaho v. Small Business Administration*,

[t]he bank, specifically [one of] its officer[s], attempted twice to persuade the [Small Business Association] to guarantee a paydown of its large existing loans . . . replacing overdue nonguaranteed loans with [Small Business Association]-guaranteed ones. Not succeeding in this effort, the bank tried to do covertly and illegally, in the amount of approximately \$115,000, what it could not do legally; use a government loan program to insure its past bad loans.

Id. at 343. The United States Court of Appeals for the Ninth Circuit employed section 241 of the Restatement (Second) of Contracts to analyze the materiality of the bank’s breach of its guarantee agreement with the SBA, found the bank’s conduct to be in violation of the standards of good faith and fair dealing, and eventually held the bank substantially breached the guarantee agreement. *Id.* at 340, 344, 348 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241).

47. See *New Windsor Volunteer Ambulance Corps v. Meyers*, 442 F.3d 101, 118 (2d Cir. 2006) (“In the event that the breaching party is entitled to recover on such an unjust enrichment theory, the amount to which he is entitled is measured not by the contract price but rather by ‘the reasonable value of services rendered.’” (quoting *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 97 (2d Cir. 1994))); *Am. Nat’l Bank & Tr. Co. v. St. Joseph Valley Bank*, 391 N.E.2d 685, 687 (Ind. Ct. App. 1979) (“A breaching party may recover, apart from the contract, in *quantum meruit*.”); *Iota Mgmt. Corp. v. Boulevard Inv. Co.*, 731 S.W.2d 399, 417 (Mo. Ct. App. 1987) (“In cases of quantum meruit recovery, the breaching party of a contract is required to return to the injured party the reasonable value of work and labor furnished while the contract was sought to be performed.”); *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 25 (Tenn. Ct. App. 2005) (“A party who has materially breached a contract cannot recover on the contract. Nevertheless, under proper conditions and upon carrying the burden of proof as to the value of services rendered under the contract, he may recover in quantum meruit. The rule is: ‘Even though a contract be entire, the party who breaches the same may recover of the other party, as on a quantum merit, the value of benefits conferred on such other party by partial performance—these benefits being accepted and retained. Any damage, of course, which the party not in default suffered by the breach also to be taken into account.’” (quoting *Nat’l Life & Accident Ins. Co. v. Hamilton*, 98 S.W.2d 107, 108 (Tenn. 1936))).

48. See, e.g., *Stover v. Aetna Cas. & Sur. Co.*, 658 F. Supp. 156, 159-61 (S.D. W. Va. 1987); *Diamonds & Denims, Inc. v. First of Ga. Ins. Co.*, 417 S.E.2d 440, 441-42 (Ga. Ct. App. 1992); *DiFrancisco v. Chubb Ins. Co.*, 662 A.2d 1027, 1032-34 (N.J. Super. Ct. App. Div. 1995); *Levy v. Chubb Ins.*, 659 N.Y.S.2d 266, 266-68 (N.Y. App. Div. 1997) (precluding recovery based on material breach of contract).

other jurisdictions may still permit a recovery for restitution.⁴⁹ In either case, the breaching party is still liable for damages caused by the breach.⁵⁰ However, if there is substantial performance, though the breaching party still owes damages, the breaching party does get the contractually agreed upon amount.⁵¹

To illustrate, consider the following simplified hypothetical. Imagine a house builder who agrees to build a house for \$250,000, which takes into account the builder's expenses and a tidy little profit margin. Due to an oversight, the completed house has no doors. Assume that a house with no doors is only worth \$100,000,⁵² but that the problem can be fixed for \$50,000. If the builder is found to have materially breached the contract—an analysis that considers good faith and fair dealing—then at most the builder could claim \$100,000 as the value conferred, but would still have to pay \$50,000 in damages, thus netting only \$50,000. But if it is found that the contract has been substantially performed, then the builder will be entitled to the full \$250,000 contract price, less the \$50,000 to fix the problem, thus netting \$200,000. Therefore, if we accept that the concepts of good faith and fair dealing take into account the reason for the breach, this could make a difference of \$150,000 to our hypothetical builder.

2. Economic Waste

Related to the materiality inquiry is the defense that paying the full sum of damages would be economically wasteful. The economic waste doctrine was made famous by Judge Cardozo in the iconic case of *Jacob & Youngs, Inc. v. Kent*.⁵³ That case involved the construction of a house that specified the pipe to be used throughout the house was to be manufactured by Reading.⁵⁴ After completion of the house, it was

49. See *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, No. 5886VCP, 2013 WL 3934992, at *2, *25 (Del. Ch. July 24, 2013).

50. See *Meyer v. Chieffo*, 950 N.E.2d 1027 (Ohio Ct. App. 2011).

51. See *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 481-83 (Tex. 1984) (noting the doctrine of substantial performance recognizes that the contractor has breached the contract, but allows the breaching party to bring suit for the cost of his completed work).

52. This is obviously a simplified hypothetical, meant to illustrate a point. I acknowledge that an argument could be made that the value of the house is \$200,000, but the claim here must be made based on the value of what has been delivered to the buyer. If the buyer can sell the house for no more than \$100,000 without doors, then that is the value conferred.

53. See 129 N.E. 889 (N.Y. 1921); Hal J. Perloff, *The Economic-Waste Doctrine in Government Contract Litigation*, 43 DEPAUL L. REV. 185, 188 (1993).

54. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

discovered that a substantial portion of the pipe was not of Reading manufacture and the injured parties brought suit seeking the cost of tearing out all existing pipe and replacing it with Reading.⁵⁵ Note that even if the contract was substantially performed, this would normally be the correct measure of damages.⁵⁶ Though it was found that the wrong pipe was in fact used, Judge Cardozo denied the plaintiff the full sum of replacement, finding that the defect was insignificant in relation to the project, and that the breach “was neither fraudulent nor willful,” but was rather due to “the oversight and inattention of” the subcontractor.⁵⁷ Instead, Judge Cardozo awarded the difference in value of what was delivered and what was promised, which in the case before him was nominal.⁵⁸

In summarizing the economic waste doctrine, Cardozo highlighted the importance of the reason for the breach, stating:

This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing.⁵⁹

The economic waste doctrine thus offers up another example where the reason for the breach does not matter for liability but may have a rather large impact on damages. Since its enunciation by Cardozo, courts have continued to use the doctrine to limit recovery when the breach is not willful.⁶⁰

55. *Id.*

56. *See id.* at 890-92.

57. *Id.* at 890-91.

58. *Id.* at 891-92.

59. *Id.* at 891 (citations omitted).

60. *See Shell v. Schmidt*, 330 P.2d 817, 823 (Cal. Dist. Ct. App. 1958) (“[L]ack of willfulness is a necessary component . . . to ‘trigger’ the invoking of the value rule.”); Perloff, *supra* note 53, at 227 & n.315 (“[A] contractor cannot invoke the economic-waste doctrine if breach of the contract specifications was willful or intentional.”).

C. *Expectation Damages*

The last example of contract lore provided in Professor Hillman's original article is the myth that expectation damages will put the aggrieved party in the same position as they would have been in had the other party not breached.⁶¹ On this point I have to agree with Professor Hillman that this is lore—expectation damages as a pure contract remedy rarely if ever place the aggrieved party in the place they would have been had the other party not breached as, among other reasons, the cost of litigating the claim is not included in the recovery. However, though expectation damages do not result in a full recovery, this is an incomplete description of their utility.

Most contracts people understand that expectation damages are but one of three possible interests that can be protected—the other two being the reliance interest and the restitution interest.⁶² Expectation damages are usually sought as they normally represent the highest recovery amount and thus act as a good starting point for evaluating a claim.⁶³ However, there are instances where the reliance measure or restitution will result in a higher recovery, especially if the expectation damages are speculative.⁶⁴ In such an instance, the plaintiff may be better off recovering amounts expended in reliance on the contract, rather than the expectation interest. Of course, this claim suffers the same weakness in that it is lore—the plaintiff still must pay attorney's

61. See Hillman, *Lore I*, *supra* note 1, at 505-09.

62. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981).

63. See *Ins. Brokers W., Inc. v. Liquid Outcome, LLC*, 874 F.3d 294, 298 (1st Cir. 2017) (“Under Rhode Island law, the traditional measure of damages in an action for breach of contract is the amount that ‘will serve to put the injured party as close as is reasonably possible to the position he would have been in had the contract been fully performed.’” (quoting *George v. George F. Berkander, Inc.*, 169 A.2d 370, 372 (R.I. 1961))); *VICI Racing, LLC v. T-Mobile USA, Inc.*, 87 F. Supp. 3d 697, 699 (D. Del. 2015) (“Contract damages ‘are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed.’” (quoting *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009))); RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a.

64. See *ATACS Corp. v. Trans World Commc'ns, Inc.*, 155 F.3d 659, 669 (3d Cir. 1998) (explaining the theory of reliance damages as “seeking to achieve the position that [the injured party] would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance”); *Boulevard Assocs. v. Sovereign Hotels, Inc.*, 861 F. Supp. 1132, 1138 (D. Conn. 1994) (holding that where expectation damages were entirely too speculative, a party could receive reliance damages based on part performance of the contract); *Fid. Fund, Inc. v. Di Santo*, 500 A.2d 431, 438-39 (Pa. Super. Ct. 1985) (“[Restitution is] the prevention of unjust enrichment through the protection of his restitution interest. . . . [T]he courts must weigh several factors, including the materiality of the breach, by the party seeking restitution . . . and whether the forfeiture is disproportionate to the benefit to be received by the party against whom restitution is claimed.” (footnote omitted) (citations omitted)).

fees and go through the hassle of litigating just to be repaid. But the availability of reliance damages demonstrates that expectation damages are not really all contracts people think of when they think of remedies.

Interestingly, though restitution is often thought of as the least attractive option for a remedy, under the right circumstances a claim in restitution may require the defendant to disgorge profits well in excess of any contemplated sum for expectation damages.⁶⁵ Such was the case in *EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc.*, which involved the breach of a license by failure of the defendant to pay royalties.⁶⁶ In that case, Hydrosphere had developed software enabling its users to access hydrological and meteorological information.⁶⁷ EarthInfo acquired rights to this software under a royalty agreement that required EarthInfo to pay Hydrosphere a percentage of net sales for products developed by Hydrosphere.⁶⁸ A dispute arose as to whether newly developed derivative products were included in the royalties, and EarthInfo subsequently quit paying royalties altogether, in breach of the contract.⁶⁹ The trial court found for Hydrosphere, rescinded the contract, and ordered EarthInfo to pay over to Hydrosphere its net profits from the use of the software.⁷⁰ On appeal, the court agreed that disgorgement was a proper remedy “taking into account the nature of the defendant’s wrong, the relative extent of his or her contribution, and the feasibility of separating this from the contribution traceable to the plaintiff’s interest.”⁷¹

Two other types of recovery complicate the lore surrounding remedies: emotional harm and punitives. Typically, neither are

65. See *Kansas v. Nebraska*, 574 U.S. 445, 463 (2015) (holding that disgorgement of profits is warranted in situations where states make compacts that are breached with reckless disregard of the other’s rights); *Dastgheib v. Genentech, Inc.*, 457 F. Supp. 2d 536, 538 (E.D. Pa. 2006) (holding under North Carolina state law that where one party confers a benefit on another that is not part of the contract the damaged party may seek disgorgement); *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 118-19 (Colo. 1995) (“If, however, the defendant’s wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer’s enrichment, recovery of profits may be granted.”).

66. *EarthInfo*, 900 P.2d at 115-16.

67. *Id.*

68. *Id.* at 116.

69. *Id.*

70. *Id.* at 116-17, 120.

71. *Id.* at 119 (“Thus, the more culpable the defendant’s behavior, and the more direct the connection between the profits and the wrongdoing, the more likely that the plaintiff can recover all defendant’s profits.”). Though the court agreed that disgorgement was proper, it remanded so that the trial court could make findings as to the relative contributions made by EarthInfo. *Id.* at 119, 121.

available in a simple breach of contract case.⁷² However, in rare instances, emotional harm may be recoverable when the likelihood of emotional harm is particularly high given the nature of the contract.⁷³ The paradigmatic cases involve funeral services. For instance, in *Ross v. Forest Lawn Memorial Park*, a mother was permitted to recover emotional distress damages from a funeral home that breached its agreement to keep the funeral private.⁷⁴ The deceased daughter was a “punk rocker” and the mother “was fearful that her daughter’s former associates would disrupt the private services.”⁷⁵ These fears proved well-founded as the court colorfully described the funeral scene as follows:

Many punk rockers attended both the funeral services in the chapel and the grave-site burial services. Neither their appearance nor comportment was in accord with traditional, solemn funeral ceremonies. Some were in white face makeup and black lipstick. Hair colors ranged from blues and greens to pinks and oranges. Some were dressed in leather and chains and twirled baton-like weapons, while yet another wore a dress decorated with live rats. The uninvited guests were drinking and using cocaine, and were physically and verbally abusive to family members and their guests. A disturbance ensued and grew to the point that police had to be called to restore order.⁷⁶

The court held that emotional distress damages were compensable for a breach of contract as “[t]he contract was a lawful contract which by its nature put respondent on notice that a breach would result in emotional and mental suffering by appellant.”⁷⁷ In a similar vein, emotional harm damages have been recognized for breach of contract in other contexts where the likelihood of emotional harm flowing from a breach was particularly high.⁷⁸ Though this still falls under the lore of

72. See *Miller Brewing Co. v. Best Beers of Bloomington, Inc.* 608 N.E.2d 975, 981 (Ind. 1993) (“Opinions of this Court have consistently stated the general rule that punitive damages are not allowed in a breach of contract action.”); RESTATEMENT (SECOND) OF CONTRACTS §§ 353 cmt. a, 355 cmt. a (AM. LAW INST. 1981) (“Damages for emotional disturbance are not ordinarily allowed.”).

73. See RESTATEMENT (SECOND) OF CONTRACTS § 353.

74. 203 Cal. Rptr. 468, 470-73 (Ct. App. 1984).

75. *Id.* at 470.

76. *Id.*

77. *Id.* at 473.

78. See *Fitzsimmons v. Olinger Mortuary Ass’n*, 17 P.2d 535, 537 (Colo. 1932) (recognizing action for breach of contract and damages for emotional distress arising out of mortician’s unauthorized use of decedent’s image in advertising); *Stewart v. Rudner*, 84 N.W.2d 816, 824-27 (Mich. 1957) (affirming recovery of emotional distress damages for breach of contract when physician’s failure to perform Caesarean section as agreed resulted in

expectancy damages, soft damages such as emotional harm tend to give juries room to make higher awards than otherwise might be attained.⁷⁹

Similar to emotional harm damages, punitives can compensate victims of a breach beyond their normal expectancy damages but are only available if there is an accompanying tort.⁸⁰ As fraud is both a contract voidability defense and a tort, it is a frequent allegation in breach of contract claims.⁸¹ In some instances, this may come in the form of intent to perform at inception, but more frequently it comes in the form of fraud in the inducement. Though some courts limit punitives in a contract claim, even when fraud is involved, others are more liberal in their permissiveness.⁸² Though this is due to the breach

stillbirth of the plaintiff's child); *Menorah Chapels at Millburn v. Needle*, 899 A.2d 316, 318, 324-36 (N.J. Super. Ct. App. Div. 2006) (reversing lower court's denial of recovery of emotional distress damages for breach of contract when "funeral home that caters to members of the Jewish faith [failed] to ensure that orthodox ritual requirements are met"); *Stockdale v. Baba*, 795 N.E.2d 727, 743 (Ohio Ct. App. 2003) (allowing "recovery for emotional disturbance" for breach of contract after finding any breach by defendant of his settlement contract with two women, executed in relation with his prosecution for stalking, would likely result in serious emotional distress to women).

79. See *Stewart*, 84 N.W.2d at 821, 823-27 (affirming award of \$5000 for pain, mental suffering, and loss of wages due to doctor's breach of contract despite no other economic loss); *Flores v. Baca*, 871 P.2d 962, 964, 967-68, 970 (N.M. 1994) (affirming award of \$100,000 in compensatory damages to wife of deceased for funeral home's breach of contract "to prepare decedent's body and . . . perform funeral and burial services" after finding that funeral home's failure to properly embalm decedent's body caused wife emotional distress); *Stockdale*, 795 N.E.2d at 734 (allowing each plaintiff to recover \$10,000 in emotional distress damages for breach of settlement contract when the breach caused no actual economic loss).

80. See *Ginsberg v. Gamson*, 141 Cal. Rptr. 3d. 62, 80 (Ct. App. 2012).

81. See, e.g., *Henderson v. U.S. Fid. & Guar. Co.*, 620 F.2d 530, 536 (5th Cir. 1980); *Clark v. Aenchbacher*, 238 S.E.2d 442, 444 (Ga. Ct. App. 1977).

82. Compare *Ginsberg*, 141 Cal. Rptr. at 80 ("Tort liability is a necessary predicate for punitive damages. Punitive damages may not be awarded as relief in a breach of contract claim."), and *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (Ind. 1993) ("Opinions of this Court have consistently stated the general rule that punitive damages are not allowed in a breach of contract action. Such statements suggest that there are exceptions to this rule, but upon close examination of the opinions of this Court, we find that no exceptions have ever been applied. Today we hold that, in fact, no exception exists." (citations omitted)), with *Henderson*, 620 F.2d at 536 ("Under Mississippi law, punitive damages can, within limits, be assessed for breach of contract. The act giving rise to punitive damages must be 'a willful and intentional wrong, or . . . such gross negligence and reckless negligence as is equivalent to such a wrong.'" (quoting *Seals v. St. Regis Paper Co.*, 236 So.2d 388, 392 (Miss. 1970))), and *Anderson Living Tr. v. ConocoPhillips Co.*, 952 F. Supp. 2d 979, 1046 (D.N.M. 2013) ("New Mexico recognizes that, although punitive damages are not normally available for a breach of contract, a plaintiff may recover punitive damages when a defendant's breach was 'malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights.'" (quoting *Romero v. Mervyn's*, 784 P.2d 992, 998 (N.M. 1989))), and *Clark*, 238 S.E.2d at 444 ("Even in an action for breach of contract, where there were matters of record relating to fraud, punitive damages can be awarded, for [f]raud,

involving a tort, rather than a contract, the availability of this form of damages in certain cases again demonstrates the complexity of evaluating remedies in a breach of contract claim.⁸³

Complicating the lore surrounding expectation damages even further is that many statutes alter the recovery. For instance, some states provide that the prevailing party may recover attorney's fees for a breach of contract.⁸⁴ "Little FTC" laws that have been enacted in states across the country also provide for attorney's fees to a successful plaintiff when deceptive conduct is involved,⁸⁵ as well as treble damages under certain circumstances.⁸⁶ Finally, the Magnusson-Moss Warranty Act, which applies to sales of consumer goods, provides for attorney's fees when its provisions are violated.⁸⁷

if found, is tortious conduct." (quoting *Diana v. Monroe*, 209 S.E.2d 70, 72 (Ga. Ct. App. 1974))).

83. See generally RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. LAW INST. 1981); *Id.* ch. 16, topic 3, intro. note.

84. See, e.g., ARIZ. REV. STAT. ANN. § 12-341.01 (2019) ("In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees."); ARK. CODE ANN. § 16-22-308 (2019) ("In any civil action to recover on . . . breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs."); 9 R.I. GEN. LAWS § 9-1-45 (2019) ("The court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract in which the court: (1) Finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party; or (2) Renders a default judgment against the losing party."); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2019) ("A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: . . . an oral or written contract.").

85. KAN. STAT. ANN. § 50-634(e)(1) (2019) (allowing the prevailing party of a deceptive practices claim to receive reasonable attorney's fees); TEX. BUS. & COM. CODE § 17.50(d) (2019) (requiring the prevailing consumer to be awarded attorney's fees in actions under the Deceptive Trade Practices Act); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., Co.* 719 P.2d 531, 532, 534-35 (Wash. 1986) (recognizing an attorney fee award in instances where the party prevails on proving the existence of an unfair or deceptive act).

86. See TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (allowing the trier of fact to award up to three times the economic damages if the conduct of the defense was knowing or intentional); *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 09-1633, p.8 (La. 4/23/10), 35 So. 3d 1053, 1058 (noting a finding of knowing and deceptive conduct will result in an award of attorney's fees and treble damages).

87. If a consumer finally prevails in any action brought under the Magnuson-Moss Warranty Act, he or she may be allowed to recover "a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended)." Act of Jan. 4, 1975, Pub. L. No. 93-637, 88 Stat. 2191 (codified as amended at 15 U.S.C. § 45 (1982)); see JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-18(c) (6th ed. 2010) (noting section 110 of the Magnuson-Moss Warranty Act gives the winning consumer costs and expenses "including attorneys' fees based on actual time expended").

In sum, I agree that the concept that the victim of a breached contract will be put in the same position they would be in had the breach not occurred is lore. However, this bit of lore is incomplete. Contracts people understand that expectancy damages are just one of the interests that the victim of a breach may seek to protect, and that soft damages, and state and federal statutory schemes also must be considered when evaluating contracts damages.

D. *Other Lore*

Thus far I have described Professor Hillman's lore as lying on a spectrum starting with the least lore-like in the importance of the intention of the parties and ending with the concept that is most lore-like in expectancy damages. In the middle of this spectrum is the concept that the reason for a breach is irrelevant, which I find to be more of a half-truth. In *More Contract Lore*, Professor Hillman identifies three more instances of contract lore. One is really just a further example of where the parties' intentions are irrelevant, and that is when courts attempt to "gap fill" contracts.⁸⁸ The other two bits of contract lore offered are that "promises are enforceable only if they are supported by consideration," and "consumers consent to standard form contracts."⁸⁹ I believe these similarly fit along a spectrum of more or less lore-like.

As gap-fillers are just a further example of the lore surrounding intention of the parties, I would place this in the same category as the least lore-like. While it is true that when parties leave gaps in their contract, a court may be asked to fill them in ways that may not truly reflect the intention of the parties (especially at the time litigation arises),⁹⁰ the gap-filling process is still designed to respect the intentions of the parties by using a term that is "reasonable in the

88. Hillman, *Lore II*, *supra* note 3, at 908-10.

89. *Id.* at 910-11, 906-07.

90. *See F.W.F., Inc. v. Detroit Diesel Corp.*, 494 F. Supp. 2d 1342, 1359 (S.D. Fla. 2007) ("Under 'general principles of contract law,' a failure to locate explicit contractual language does not mark the end of proper judicial interpretation and construction." (quoting *Dobson v. Hartford Fin. Servs. Grp., Inc.*, 389 F.3d 386, 399 (2d Cir. 2004))); *Metro-Goldwyn-Mayer, Inc. v. Scheider*, 360 N.E.2d 930, 931 (N.Y. 1976) (holding that if a contract has been formed, the court will enforce a missing provision by some objective manner irrespective of either party's wish or desire); *Gallagher v. Upper Darby Twp.*, 539 A.2d 463, 467, 473 (Pa. Commw. Ct. 1988) (holding that the law of contracts will imply and enforce an obligation that was either in the contemplation of the parties during negotiation or is necessary to carry out the parties' intentions).

circumstances.”⁹¹ When a dispute arises, each party is likely to advocate for a gap-filler that benefits themselves.⁹² The challenge to the court is to see beyond these self-interested arguments and try to discern what the parties likely would have agreed upon when the contract was formed.⁹³

I believe consideration is similar to the lore regarding the reason for the breach. It is true on a very basic level in that it separates purely donative gifts from contracts and so the requirement for consideration is not pure lore.⁹⁴ However, the requirement can devolve rather quickly given the right set of circumstances. For instance, in the context of charitable gifts, some courts have found that a charitable organization’s agreement to restrict how it uses donated funds to be sufficient consideration,⁹⁵ or undertaking to get matching donations to be enough to enforce the promise as a contract.⁹⁶ And of course, promissory estoppel can always be asserted if a promise, though lacking

91. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. LAW INST. 1981) (“Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances.”). The comments do go on to note that circumstances may arise where no agreement was made, and then directs that “the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.” *Id.*

92. *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 263 (3d Cir. 2008) (arguing by a patient that a provision in a hospital agreement to pay for services rendered was open-ended and thus ambiguous); *Fitzpatrick v. Teleflex, Inc.*, 763 F. Supp. 2d 224, 234-35 (D. Me. 2011) (noting one party argued that a missing term of duration of a contract created an ambiguity of a long term contract, while the other party argued that the missing duration meant terminable at will); *F.W.F., Inc.*, 494 F. Supp. 2d at 1360 (arguing that a settlement agreement required one party pay all the costs associated with the repairs to a boat “without limit” because the terms of the settlement agreement did not specify a specific amount related to costs of restoring the boat as agreed).

93. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (“Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention.”).

94. See Hillman, *Lore II*, *supra* note 3, at 910-11.

95. See *Trs. of Baker Univ. v. Clelland*, 86 F.2d 14, 20 (8th Cir. 1936) (finding consideration when a gift made to a college in exchange for an understanding that an honorary Chair of the English Bible would be maintained in memory of the donee); *Robinson v. Nutt*, 70 N.E. 198, 198-99 (Mass. 1904) (finding consideration when a gift to a church was conditioned on the church not incurring certain expenses and maintaining a budget which the church relied upon and performed); *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank of Jamestown*, 159 N.E. 173, 176 (N.Y. 1927) (finding consideration where a promisor requested that the gift be used as an endowment in memory of the promisor).

96. *Robinson*, 70 N.E. at 199 (holding a promise to match a charitable donation to a parish as sufficient consideration to uphold the agreement to do so); *Ladies’ Collegiate Inst. v. French*, 16 Mass. (1 Gray) 196, 201 (1860) (determining a subscription to donate to a school constituted a concurrent promise sufficient to make the promise binding).

consideration, reasonably induces another to act to their detriment in reliance on the promise.⁹⁷ Thus, while there is some truth to the statement that a contract requires consideration, contracts people understand that context matters.

The strongest example of lore in this new trio is that consumers actually consent to all of the terms in standard form contracts. Much has been written on whether consumers actually read these terms—they don't—and whether they should be bound.⁹⁸ But even this bit of lore faces some push-back in the courts. Not all courts are willing to enforce rolling contracts, particularly if there is no opportunity given to object to the terms.⁹⁹ Others rely on a lack of notice of the terms, such as when an online merchant attempts to bind consumers to terms through browsewrap terms.¹⁰⁰ Other courts invoke section 211(3) of the

97. RESTATEMENT (SECOND) OF CONTRACTS § 90 (“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.”); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS § 61 (2d ed. 1965) (“Detrimental action or forbearance by the promisee in reliance on a gratuitous promise, within limits constitutes a *substitute* for consideration, or a *sufficient* reason for enforcement of the promise without consideration. This doctrine is known as promissory estoppel.” (emphasis added)).

98. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 57 (2013) (“Many commentators have written about the failure of consumers to read standard form contracts.”); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (“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.”).

99. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000) (holding that simply keeping a computing for five days was insufficient to manifest an assent to additional terms enclosed in a box ordered by the customer); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S. 2d 569, 572 (App. Div. 1998) (holding that transactions involving “cash now terms later” the contract terms do not become effective until the consumer has an opportunity to read them); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1071 (R.I. 2009) (“It is simply unreasonable to expect a seller to apprise a consumer of every term and condition at the moment he or she makes a purchase. A modern consumer neither expects nor desires to wade through such minutia . . .”).

100. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178 (9th Cir. 2014) (“But the proximity [to the order button] or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, and Barnes & Noble directs us to no case law that supports this proposition.”); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (“We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.”); *In re Zappos.com, Inc. Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1064 (D. Nev. 2012) (“The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use. No reasonable user would have reason to click on the Terms of Use, even those

Restatement (Second) of Contracts¹⁰¹ and strike terms that consumers would not reasonably expect.¹⁰²

E. Is It Really All Aspirational?

Professor Hillman posits that one reason for the persistence of the above lore is that it is aspirational, and “cognitive dissonance, which constitutes the tendency of people to strive towards a consistency in internal beliefs, which often leads them to believe things that are not true and to avoid conflicting information.”¹⁰³ In *More Contract Lore*, Hillman continues to point to cognitive dissonance as an explanation for contract lore but acknowledges that although it “is part of the mystery of contract lore, a one ‘size fits all’ explanation is incomplete.”¹⁰⁴ He then explores political and other more “benign” explanations for lore, such as simplification of complex legal principles. However, cognitive dissonance remains a central theme, and one I would like to further explore before proposing my own explanation for contract lore.¹⁰⁵

Professor Hillman posits that contract “lore” may be aspirational, and what is driving its persistence is cognitive dissonance: “the tendency of people to strive towards a consistency in internal beliefs.”¹⁰⁶ But, just as with the lore discussion, I believe the degree to which these different observations are aspirational varies. The strongest

users who have alleged that they clicked and relied on statements found in adjacent links, such as the site’s ‘Privacy Policy.’”)

101. RESTATEMENT (SECOND) OF CONTRACTS § 211(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.”); *id.* § 211 cmt. d (“But baggage checks or automobile parking lot tickets may appear to be mere identification tokens, and a party without knowledge or reason to know that the token purports to be a contract is then not bound by terms printed on the token. Documents such as invoices, instructions for use, and the like, delivered after a contract is made, may raise similar problems.”).

102. See *Hines v. Overstock.com, Inc.*, 380 F. App’x 22, 24 (2d Cir. 2010) (finding that an arbitration clause contained in the browsewrap “Terms and Conditions” hyperlink was not sufficient to constitute notice sufficient for the consumer to assent to an arbitration clause contained therein); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 366-67, 404 (E.D.N.Y. 2015) (holding that where terms were not conspicuous through browsewrap, scrollwrap, and clickwrap “[t]hey are not enforceable against ordinary consumers who are unlikely to be aware of [the terms]”); *Reedy v. Cincinnati Bengals, Inc.*, 758 N.E.2d 678, 685 (Ohio Ct. App. 2001) (holding when terms arrive after acceptance of a contract and without notice of material changes to the contract, the new terms are not enforceable).

103. HILLMAN, *supra* note 11, at 515.

104. Hillman, *Lore II*, *supra* note 3, at 915.

105. *Id.* at 911-23.

106. Hillman, *Lore I*, *supra* note 1, at 515.

statement of aspiration happens to be the one that is least lore-like and that is the primacy the parties' intentions play in contract interpretation. This seems to be the strongest statement of an agreed aspiration, and as I have stated, the reliance on the objective theory is really just a means by which we try to achieve this goal.¹⁰⁷ Hillman also points to freedom of contract as an aspiration that explains some of the lore, such as the myth that consumers consent to standard forms, and I agree that this may be an explanation for the persistence of this particular bit of lore.¹⁰⁸ It is one that has come under harsh criticism, however, as Hillman notes.¹⁰⁹ Given the criticism that contracts scholars have unleashed on adhesive contracts, particularly in an online setting, I wonder whether the modern use of "freedom of contract" is still an aspiration as it appears to permit enforcement of terms without actual assent.¹¹⁰

Many of Hillman's other observations seem to arguably be even less aspirational. For instance, the requirement that consideration be present for a contract has certainly been questioned. It is defended on grounds that it serves signaling functions in that consideration helps to differentiate seriously taken promises from unenforceable gifts.¹¹¹ Professor Lon L. Fuller also argued that the formal requirements of consideration serve evidentiary functions in that it helps ensure a promise was actually made.¹¹² But other scholars have criticized its importance, some arguing that consideration should merely be evidence of consent, but not the sine qua non of a contract.¹¹³ And the

107. Craig Leonard Jackson, *Traditional Contract Theory: Old and New Attacks and Old and New Defenses*, 33 NEW ENG. L. REV. 365, 367 (1999) ("In trying to discover the identity of an individual's actions, we have to ponder the reasons behind the actions, which means that we have to ponder what was in a person's mind at a given moment.").

108. Hillman, *Lore II*, *supra* note 3, at 914-15.

109. *See id.* at 913-14; Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1138-40 (2019) (distinguishing "assimilationists"—who try to fit modern-day boilerplate terms into typical contract rules so long as there is constructive notice of the terms—and the historical use of concepts of assent and consent); *see also* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 138-42 (2012) (reviewing the historical development of the term "freedom of contract" and concluding that the modern use of the term is reminiscent of manorial systems in feudal England).

110. Preston & McCann, *supra* note 109, at 169.

111. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941) (identifying both a cautionary and channeling function); Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 935-37 (1958); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 46 (1993).

112. Fuller, *supra* note 111, at 800-01.

113. *See* Wessman, *supra* note 111, at 68 ("The doctrines that correlate to these core notions of agreement and promise are the various doctrines of assent, not the rules grouped

mere existence of promissory estoppel as an alternate theory of recovery when consideration is lacking would seem to be a recognition that consideration should not be required in all cases to make a promise enforceable.¹¹⁴

The observations that willfulness in contract breach is irrelevant and that expectation damages should put the nonbreaching party only in as good a position as they would have been had the other party not breached have both come under attack.¹¹⁵ The irrelevance of willfulness has been attacked particularly in discussions regarding efficient breach.¹¹⁶ Indeed, a handful of jurisdictions briefly recognized

under the doctrine of consideration.” (citations omitted)); *see, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 311-12 (1986) (“If it is widely known that the written phrase ‘in return for good and valuable consideration’ means that one intends to make a legally binding commitment, then these words will fulfill a channeling function as well as, and perhaps better than, a seal or other formality. The current rule that the falsity of such a statement permits a court to nullify a transaction because of a lack of consideration is therefore contrary to a consent theory of contract.”); Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn’t Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 243 n.100 (2017) (“After more than a decade teaching contract law, I can testify that the one rule of contract law that all 1L students arrive at law school knowing is that if you sign on the dotted line you are bound by the terms of the agreement. The irony, of course, is that because of the doctrine of consideration the one rule that everyone knows is wrong.”).

114. RESTATEMENT (SECOND) OF CONTRACTS §§ 90, 139 (AM. LAW INST. 1981); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (1981) (“An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.”); Efi Zemach & Omri Ben-Zvi, *Contract Theory and the Limits of Reason*, 52 TULSA L. REV. 167, 179 (2017) (“The convention of promising is, therefore, a necessary device by which individuals meet goals and purposes by enlisting the collaboration of other free persons. . . . At the same time, by forcing a promisor to keep her promise, we respect her capacity as a free, rational, and autonomous moral agent.” (citation omitted)).

115. Patricia H. Marshall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733, 735 (1982).

116. *See* David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1164 (1999) (“[M]ost judicial references to efficient breach theory appear in a second context, one in which the injured party is attempting to obtain more than full compensation, usually through a claim for punitive damages for a willful breach.”); Frank J. Cavico, Jr., *Punitive Damages for Breach of Contract—A Principled Approach*, 22 ST. MARY’S L.J. 357, 373-75 (1990) (“[Efficient breach theory] continually downplays or disregards the wrongfulness of the breaching party’s conduct regardless of how outrageously immoral, offends one’s sense of fairness and justice and engenders disrespect for the law.”); Marshall, *supra* note 115, at 734 (arguing the efficient breach theory “is faulty and that such breaches should not be encouraged by the courts’ use of remedial principles that allow the willful breacher to profit from his breach”); Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859, 882 (2000) (“If we wish to take seriously the moral force of contracts as promises, then efficient breaches should not be encouraged.”).

a claim for bad faith breach of contract in tort.¹¹⁷ Though this cause of action was short-lived, it demonstrates a dissatisfaction with a legal regime that does not provide adequate relief when breach is willful.¹¹⁸ Expectation damages have been criticized as not an adequate interest to protect, even if fully realized. Professor Richard Craswell summarized Fuller and Perdue's three interests (expectation, reliance, and restitution) as follows:

To most modern scholars (as to Fuller and Perdue), remedies can be defended only by reference to some purpose or policy they might serve. We might adopt broader or narrower remedies in order to create efficient incentives, for example, or to achieve certain distributional goals, or to affirm an important symbolic message. Under any of these approaches, the analysis starts with the particular goal to be achieved—efficiency, distribution, or what have you—and proceeds on that basis to decide what remedy ought to be awarded. Under these approaches, then, there is no reason to think that the remedy that best serves the chosen substantive goal will necessarily coincide with one of Fuller and Perdue's three "interests." Moreover, even when one of these approaches does happen to coincide (in its recommended remedy) with one of those three "interests," that coincidence will appear only at the *conclusion* of the analysis: the particular "interest" that is selected will not have played any role in the analysis leading up to that conclusion. There thus is no reason to *begin* our analysis with Fuller and Perdue's three "interests," or to treat those "interests" as key concepts of any sort.¹¹⁹

Relating these two observations, other scholars have argued that punitive damages should be available in cases of willful breach.¹²⁰

All of this isn't to say that the lore observations Professor Hillman identifies are not aspirational to some group of contracts people—all have their defenders and justifications. But given the debates over these

117. See Marschall, *supra* note 115, at 758-60.

118. See *generally id.*

119. Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 106-07 (2000).

120. See Cavico, *supra* note 116, at 444 ("Punitive damages are appropriate to address willful, tort-like misconduct arising out of a breach of contract."); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 633 (1999) (arguing "on economic grounds that punitive damages should be available for all willful breaches of contract, including both opportunistic breaches and efficient breaches"); Marschall, *supra* note 115, at 759-60 ("Any breach of contract which is found to be willful and in unreasonable disregard of the other party, should subject the breaching party to punitive damages." (citation omitted)); John A. Seibert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1568-69 (1986) (noting that the strict limitation of punitive damages in contract cases contributes to the undercompensation of contract plaintiffs).

observations, calling them all aspirational doesn't seem a satisfying explanation for their persistence. Indeed, some of the most lore-like observations also seem to be some of the most criticized, which might indicate that the departure in reality from the stated legal principle may be the natural inclination of litigants and jurists to move toward something more in line with the evolving aspirations of the contract law community. In other words, the fact that these statements have become lore may be evidence in-and-of-itself that these observations are not aspirational.

III. CONTRACT LORE AS HEURISTIC STARTING POINTS

As discussed above, I find a unifying explanation for the persistence of lore as being attributable to cognitive dissonance unsatisfying as I disagree that it is all aspirational. Instead, I would offer that a more satisfying explanation is that the lore observations are really heuristics or at least heuristic starting points. Each observation provides a jumping off point for addressing a contract problem, be it by a student, practitioner, or scholar. However, given that many of these starting points are not all aspirational, it does beg the question, why are these the starting points?

A. *A Brief Explanation of Heuristics*

In Professor Hillman's original article on contract lore, he dismisses heuristics as an explanation, stating, "Because contract lore is not always certain in application and often constitutes poor advice to contracting parties, I also doubt that we can explain it as a set of heuristics or shortcuts developed by transactional lawyers to simplify advice to their clients."¹²¹ This approach seems to treat heuristics as merely legal macros, and if this were the only definition of a heuristic, Professor Hillman would be correct.¹²² The contract lore he identifies would be a poor macro as the end results are not uniform.¹²³ For this essay, I am using a slightly different definition of a heuristic—one that encapsulates the discernment that contracts people go through when presented with a problem that is addressed by "lore."

Christopher Engel and Gerd Gigerenzer provide a broader definition of heuristics than simply a shortcut.

121. Hillman, *Lore I*, *supra* note 1, at 514.

122. *See id.*

123. *See id.*

What is a heuristic? Why would anyone rely on heuristics? The term *heuristic* is of Greek origin and means “serving to find out or discover.” In the title of his Nobel Prize–winning paper of 1905, Einstein used the term *heuristic* to indicate an idea that he considered incomplete, due to the limits of our knowledge, but useful. For the Stanford mathematician Polya (1954), heuristic thinking was as indispensable as analytical thinking for problems that cannot be solved by the calculus or probability theory—for instance, how to find a mathematical proof.¹²⁴

Applying heuristics in a law school setting, Robert Rhee, also drawing upon Polya, describes heuristics as a framework “that puts the classroom process into a larger structure of a problem-solving process.”¹²⁵ As heuristics can also be explained as a framework for solving problems, I would classify much of contract lore as part of this framework—so perhaps it would be more accurate to label contract lore as “heuristic starting points.”

B. *Contract Lore as Heuristic Starting Points*

I believe that a more satisfying explanation for contract lore is that it aids the student, practitioner, or jurist to solve the problem at hand. For instance, when an issue of contract interpretation arises, the starting point is the “lore” that we give primacy to the intention of the parties. This is the starting point. From there we proceed to answering the question “what was the intention of the parties?” As all contracts people know, to answer this we must first look to the objective manifestation of their intentions, typically the express terms of the contract.¹²⁶ But we don’t stop there, as other contextual evidence may also affect this analysis, such as course of performance, course of dealing, and trade

124. Christoph Engel & Gerd Gigerenzer, *Law and Heuristics: An Interdisciplinary Venture*, in *HEURISTICS AND THE LAW 2* (Christoph Engel & Gerd Gigerenzer eds., 2006).

125. Robert J. Rhee, *The Socratic Method and the Mathematical Heuristic of George Polya*, 81 ST. JOHN’S L. REV. 881, 883-85 (2007).

126. See *Griesmann v. Chem. Leaman Tank Lines, Inc.*, 776 F.2d 66, 72 (3d Cir. 1985) (“[T]rial courts are bound to interpret contractual terms to give effect to the parties’ ‘objective manifestations of their intent’ rather than attempt to ascertain their subjective intent. Only if the terms used are ambiguous [sic], or if the contract is not fully integrated, should the trial judge allow the finder of fact to consider evidence that might vary or add to the contract’s express terms.” (citations omitted)); *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989) (“Since the purpose of contract interpretation is to give effect to the express intent of the parties, we begin our analysis of Beatrice’s obligation with an examination of the express terms of the Settlement.”); *Gene & Harvey Builders, Inc. v. Pa. Mfrs. Ass’n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986) (“The goal of [contract interpretation] is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument.”).

usage,¹²⁷ which are all to be read, when possible, as consistent with the express terms.¹²⁸ Even once an objective intent can be discerned, contract law has developed numerous equitable outs for when a contract is formed under suspicious circumstances such as fraud, duress, or when a contract is found to be unconscionable.¹²⁹

Similarly, contract people know that a contract requires consideration to be enforceable, but that is just the beginning of the analysis. If the case involves a charitable subscription, a court may be more flexible with what counts as valid consideration, and if the contract issue is an option contract, all that is necessary is “purported” consideration.¹³⁰ Further, even if consideration is lacking, other doctrines may provide an alternate avenue to relief for a plaintiff. Promissory estoppel has been recognized by many courts as a substitute for consideration.¹³¹ And if a contract were to fail, either

127. See U.C.C. § 1-303(d) (AM. LAW INST. & UNIF. LAW COMM’N 2011) (“A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.”); RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. LAW INST. 1981) (stating that course of performance, course of dealing, and trade usage may be used to aid interpretation of a contract); *id.* § 203(b) (“[E]xpress terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade.”).

128. See U.C.C. § 1-303(e) (“[T]he express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other.”); RESTATEMENT (SECOND) OF CONTRACTS § 202(5) (“Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.”).

129. See RESTATEMENT (SECOND) OF CONTRACTS ch. 12, topic 1, intro. note.

130. See *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 964 (5th Cir. 1999) (“To be binding, an option contract must: (1) be signed by the offeror; (2) recite a purported consideration for making the offer; and (3) propose an exchange on fair terms within a reasonable time.” (citing RESTATEMENT (SECOND) OF CONTRACTS § 87)); *Salsbury v. Nw. Bell Tel. Co.*, 221 N.W.2d 609, 613 (Iowa 1974) (“It is more logical to bind charitable subscriptions without requiring a showing of consideration or detrimental reliance.”); *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 110 (Tex. 2004) (holding an option contract that recites purported consideration is enforceable); RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (“American courts have traditionally favored charitable subscriptions and marriage settlements and have found consideration in many cases where the element of exchange was doubtful or nonexistent.”); *id.* § 87 (emphasis added) (“(1) An offer is binding as an option contract if it (a) is in writing and signed by the offeror, recites a *purported* consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time.”).

131. See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1106 (9th Cir. 2009) (“In most states, including Oregon, “[p]romissory estoppel” is not a “cause of action” in itself; rather it is a subset of a theory of recovery based on a breach of contract and serves as a substitute for consideration.” (quoting *Rick Franklin Corp. v. State ex rel. Dep’t of Transp.*, 140 P.3d 1136,

because no objective intent can be discerned or for lack of consideration, unjust enrichment may provide relief.¹³²

1140 n.5 (Or. Ct. App. 2006)); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (“Promissory estoppel provides a party with a remedy to enforce a promise where the formal requirements of a contract have not been satisfied, often serving as a substitute for one of these formal requirements, usually consideration.”); *Middle E. Banking Co. v. State St. Bank Int’l*, 821 F.2d 897, 907 (2d Cir. 1987) (“Reliance is a necessary element of promissory estoppel, which, in certain contexts, may serve as a substitute for consideration.”); *Platt Pacific, Inc. v. Andelson*, 862 P.2d 158, 167 (Cal. 1993) (“Under the doctrine of promissory estoppel, the promise by one party and the resulting detrimental reliance on that promise by another party operate as a substitute for consideration that may make the modification enforceable to the extent necessary to prevent injustice.”); *Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000) (“Promissory estoppel is more accurately viewed as a consideration substitute for promises which are reasonably relied upon, but which would otherwise not be enforceable.”); *SilverWing at Sandpoint, LLC v. Bonner Cty.*, 435 P.3d 1106, 1118 (Idaho 2019) (“[P]romissory estoppel serves as a substitute for consideration in those circumstances when the parties have a binding agreement, which otherwise would be unenforceable because of lack of consideration.”); *Bank of Marion v. Robert “Chick” Fritz, Inc.*, 311 N.E.2d 138, 140 (Ill. 1974) (“[P]romissory estoppel . . . is usually considered as a substitute for consideration or an exception to its ordinary requirements.”); *First Nat’l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 954 (Ind. 1991) (“The doctrine of promissory estoppel can act as a substitute for lack of consideration or lack of mutuality.”); *Kolkman v. Roth*, 656 N.W.2d 148, 153 (Iowa 2003) (“[P]romissory estoppel is not only a substitute for consideration, but is also recognized as an exception to the statute of frauds even in cases where the promise may be supported by consideration.”); *Decatur Cty. Feed Yard, Inc. v. Fahey*, 974 P.2d 569, 577 (Kan. 1999) (“Promissory estoppel developed as a substitute for consideration, which allowed a court to enforce an otherwise unenforceable promise.”); *Chapman v. Bomann*, 381 A.2d 1123, 1126 (Me. 1978) (“It has often been said that promissory estoppel is the principle by which contract law avoids injustice through recognition of a substitute for traditional consideration.”); *Vancheri v. GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989) (“The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties.”); *E. Providence Credit Union v. Geremia*, 239 A.2d 725, 727 (R.I. 1968) (“Traditionally, the doctrine of promissory estoppel has been invoked as a substitute for a consideration, rendering a gratuitous promise enforceable as a contract.”); *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 326 S.E.2d 395, 406 (S.C. 1985) (“The principle of promissory estoppel is viewed as a substitute for, or an equivalent of, consideration.”); *Ravarino v. Price*, 260 P.2d 570, 575 (Utah 1953) (“Promissory estoppel is historically rooted as a substitute for consideration.”).

132. See *Sherrill v. Frank Morris Pontiac-Buick-GMC, Inc.*, 366 So.2d 251, 257 (Ala. 1978) (allowing plaintiff to recover under the principle of unjust enrichment because she believed she was contractually obligated to pay defendant when, in reality, she was not, because their contract failed for lack of consideration); *Uppal v. Waters*, No. CV N16C-02-047 EMD, 2016 WL 4211774, at *3 (Del. Super. Ct. Aug. 9, 2016) (“Unjust enrichment is an alternative theory under contract law for when a party is unjustly enriched and there is no contract that can be enforced as a remedy.”); *Associated Mgmt. Servs., Inc. v. Ruff*, 424 P.3d 571, 595 (Mont. 2018) (“[U]njust enrichment applies in the contract context only when a party renders ‘a valuable performance’ or confers a benefit upon another under a contract that is invalid, voidable, ‘or otherwise ineffective to regulate the parties’ obligations.” (quoting RESTATEMENT (THIRD) OF RESTITUTION § 2(2) cmt. c (AM. LAW INST. 2010)); RESTATEMENT (THIRD) OF RESTITUTION § 31 (“(1) A person who renders performance under an agreement that cannot be enforced against the recipient by reason of (a) indefiniteness, or (b) the failure

In each of the above described instances, contract lore provides the starting point to analyzing contract issues, but lore can also be used to channel claims into other areas of law. For instance, if the basic expectancy damages seem inadequate, a plaintiff can look to other causes of action in tort.¹³³ If a third party knowingly induced a breach, tortious interference with contract may be available.¹³⁴ If a faulty product causes personal injury, products liability may be a superior avenue than a pure contract claim.¹³⁵ Certain contracts may also give rise to fiduciary duties,¹³⁶ and though fraud is a defense in contracts, it

to satisfy an extrinsic requirement of enforceability such as [lack of consideration] has a claim in restitution against the recipient as necessary to prevent unjust enrichment.”).

133. See Cavico, *supra* note 116, at 388.

134. See Hamann v. Carpenter, 937 F.3d 86, 90 (1st Cir. 2019) (“Under Massachusetts law, a plaintiff bringing a claim of tortious interference with a contractual relationship must prove that ‘(1) he had a contract with a third party; (2) the defendant knowingly interfered with that contract . . . ; (3) the defendant’s interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant’s actions.’” (omission in original) (quoting O’Donnell v. Boggs, 611 F.3d 50, 54 (1st Cir. 2010))); Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos., 795 F.3d 1124, 1133 (9th Cir. 2015) (“The elements of a tortious interference with contract claim are: ‘(1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional acts designed to induce breach or disruption of the contract; (4) actual breach or disruption; and (5) resulting damage.’” (quoting Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 825 (9th Cir. 2008)); Painter’s Mill Grille, LLC v. Brown, 716 F.3d 342, 353-54 (4th Cir. 2013) (“To establish a claim for wrongful interference with a contract, a plaintiff must demonstrate ‘(1) [t]he existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant’s knowledge of the contract; (3) the defendant’s intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom.’” (quoting Blondell v. Littlepage, 968 A.2d 678, 696 (Md. Ct. Spec. App. 2009))); Kirch v. Liberty Media Corp., 449 F.3d 388, 401 (2d Cir. 2006) (“Under New York law, the elements of tortious interference with contract are (1) ‘the existence of a valid contract between the plaintiff and a third party’; (2) the ‘defendant’s knowledge of the contract’; (3) the ‘defendant’s intentional procurement of the third-party’s breach of the contract without justification’; (4) ‘actual breach of the contract’; and (5) ‘damages resulting therefrom.’” (quoting Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1375 (N.Y. 1996))).

135. See Donald J. Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUT. L. REV. 692, 693 (1965) (“The doctrine of strict liability in tort . . . render[s] outmoded the warranty aspects of product liability law as governed by the Uniform Commercial Code.”).

136. See, e.g., Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1-2 (2001) (recognizing the durable power of attorney as a contractual fiduciary relationship); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 595 (1997) (“The concept ‘fiduciary’ . . . has often been said to be entailed in a large number of . . . contractual relationships, such as banks with borrowers or depositors, franchisors with franchisees, licensors with licensees, and distributorships.”); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (describing the fiduciary relation as contractual); Larry E.

is also a tort.¹³⁷ All of these causes of action provide the opportunity to claim punitive damages and therefore may represent a superior recovery to a contract claim.¹³⁸

In sum, contract lore can be viewed as starting points for a larger analytical problem-solving framework. Contract lore may provide a starting presumption from which the analysis begins. From there, the student, practitioner, or jurist is expected to understand that additional analyses may be required. The starting point may be incomplete, or there may be an equitable response developed at law that provides relief or an exception to relief. And at the end of the day, if contract law is insufficient, other areas of law, such as tort, may provide relief.¹³⁹

Along with providing a framework, contract lore's persistence may be attributable to the need for contracts people to have a common starting point. When contracts people sit down to negotiate a contract, it is important that they have a shared understanding of how their words and conduct will be viewed post hoc. As Professor Jeffrey Lipshaw has noted:

The received wisdom among most academic theorists and “lawyers’ lawyers” is that rational actors will shape their voluntary agreements before the fact in light of their expectation of how the system will resolve disputes after the fact. The body of contract law propositions thus provides a default reconstruction of the entire transactional lifecycle, but it does so only through the lens of the after-the-fact adjudication that sets the normative rules.¹⁴⁰

Said another way, contract “lore” are the common sets of normative rules that contracts people play by. Thus, not only are these heuristic starting points important as a framework for problem-solving, but they are also important because they are a shared framework amongst contracts people.

Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 902 (2011) (“[O]ne becomes a fiduciary only by contract . . .”).

137. RESTATEMENT (THIRD) OF TORTS § 9 (AM. LAW. INST., Tentative Draft No. 2, 2014) (“One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other’s justifiable reliance on the misrepresentation.”).

138. *Id.*

139. *Id.*

140. Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN. ST. L. REV. 987, 992 (2012).

C. *But Why Are These the Starting Points?*

While I believe that contract lore's persistence can be better explained as heuristic starting points, a question still remains that is related to Hillman's original essay—why are these the starting points? As Hillman points out, many of the observations he labels as lore are nowhere near accurate.¹⁴¹ As I've discussed above, though I think it is more nuanced, I largely agree that there is a lore-like quality to many of Hillman's observations. Hillman asks why we keep saying these things if they are not true and offers cognitive dissonance as an explanation.¹⁴² I offer an alternate explanation in heuristics, but must admit that, while this may explain the persistence of lore, it doesn't justify it. If the heuristic starting point is riddled with exceptions, and is not aspirational, then why do we use these as the starting points at all?

Perhaps the best explanation is that legal theories and rules are sticky, i.e., once established they tend to persist even after they have proven to make little sense. The Statute of Frauds is a good example of this. The rule was carried over from England¹⁴³ and remains in the United States even though it has been abolished in England.¹⁴⁴ The utility of the Statute of Frauds has come under attack as no longer necessary¹⁴⁵ and is subject to exceptions such as the part performance

141. Hillman, *Lore I*, *supra* note 1, at 518.

142. *Id.* at 515-17.

143. See Jennifer Camero, *Zombieland: Seeking Refuge from the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKCL. REV. 1, 2 (2013) ("England did enact the Statute of Frauds in the late seventeenth century to combat the widespread problem of perjury.").

144. Law Reform (Enforcement of Contracts) Act, 2 & 3 Eliz. 2 c. 34, § 2 (Gr. Brit.); *Statutes of Frauds—Part of English Act Repealed*, 68 HARV. L. REV. 383, 383-84 (1954) (recognizing Parliament repealed section four of the Statute of Frauds while the United States has revised, rather than repealed, the provisions).

145. Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 541 (1928) (outlining Professor Willis' 1928 argument that "the Statute of Frauds are no longer preventing fraud" and that "[t]hey should be abolished," and further citing Professor Holdsworth's concurrence with Professor Willis that the Statute of Frauds has "outlived its usefulness").

exception,¹⁴⁶ promissory estoppel,¹⁴⁷ and party admissions.¹⁴⁸ Yet the rule remains. On a larger scale, classicism was a leading theory in contract law throughout much of the late eighteenth and early nineteenth century before slowly being taken over and replaced by legal realism.¹⁴⁹ But this trend took time and was aided by Karl Llewellyn's influence in drafting the Uniform Commercial Code¹⁵⁰ and

146. U.C.C. § 2-201(3)(a), (c) (AM. LAW INST. & UNIF. LAW COMM'N 2018); *see also* Kalas v. Cook, 800 A.2d 553, 558 (Conn. App. Ct. 2002) (applying the UCC exception to the Statute of Frauds for goods that are specially manufactured for a buyer under circumstances that are reasonable for the seller to begin manufacturing and before repudiation by the buyer); *Morris v. Perkins Chevrolet, Inc.*, 663 S.W.2d 785, 787 (Mo. Ct. App. 1984) (holding that under the UCC where there is no dispute as to quantity, partial payment validates an oral contract so as to remove it from the Statute of Frauds); *W.I. Snyder Corp. v. Caracciolo*, 541 A.2d 775, 778 (Pa. Super. Ct. 1988) ("It is clear under the Code that partial payment will render the contract enforceable with respect to the goods for which payment has been made.").

147. *See* *Carl A. Haas Auto. Imps., Inc. v. Lola Cars Ltd.*, 933 F. Supp. 1381, 1390-91 (N.D. Ill. 1996) ("Illinois UCC—has expressly proclaimed 'that the statute of frauds is applicable to a promise claimed to be enforceable by virtue of the doctrine of promissory estoppel.' This Court accepts the quoted language as an accurate statement of current Illinois law." (citations omitted)); *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872, 878-79 (Ct. App. 1988) (finding the majority rule of applying promissory and equitable estoppel to oral contracts was the better rule to avoid an "unconscionable injury" to another who changed their position to their detriment while relying on the oral promise of another); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 707 (Tex. Ct. App. 1988) (holding that a claim of promissory estoppel may be asserted against the Statute of Frauds, but the requirements of estoppel must be met as well as a "show[ing] that the promisor either misrepresented that the statute of frauds had been satisfied, or promised to sign a written agreement").

148. *Synergistic Techs., Inc. v. IDB Mobile Commc'ns, Inc.*, 871 F. Supp. 24, 33 (D.D.C. 1994) (holding where the defendant's admission to a joint venture agreement was sufficient to support an excuse of the Statute of Frauds and thus create an enforceable oral contract); *Garrison v. Piatt*, 147 S.E.2d 374, 375 (Ga. Ct. App. 1966) ("[T]he party charged cannot admit the fact of the contract in the manner provided and at the same time claim the benefit of the statute of frauds."); *Dehahn v. Innes*, 356 A.2d 711, 717 (Me. 1976) ("[The ultimate goal of U.C.C. § 2-201(3)(b)] is to limit the use of the statute of frauds as a shield against unfounded fraudulent claims resting in parol, while removing from the arsenal of an unscrupulous litigant an unrighteous defense against a just claim."); U.C.C. § 2-201(3)(b).

149. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) ("[Between 1920-1960,] legal realists wanted to replace formalism with a pragmatic attitude toward law generally."); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009) (discussing the emergence of legal realists as a challenge to the nineteenth century legal formalist assumptions that had dominated legal philosophy); Hessel E. Yntema, *American Legal Realism in Retrospect*, 14 VAND. L. REV. 317, 328 (1960) ("[The legal realist movement is a] critical contemplation of doctrinal formulations that seemed no longer appropriate.").

150. Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429, 429 (1997) (discussing Llewellyn's realist vision of law and commerce that led to the drafting of the U.C.C.); Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953) (discussing the need for a commercial code as a critical response to making law for judges, instead of creating law to respond to the needs of real world business); Zipporah Batshaw Wiseman, *The Limits of Vision: Karl*

E. Allan Farnsworth's influence as the reporter for the Restatement (Second) of Contracts.¹⁵¹

Professor Hillman's observations, therefore, may simply be a recognition that we need to reexamine some of these rules. If a rule is littered with exceptions to the point that the rule is mostly lore, perhaps it should not be a heuristic starting point. Further, if the starting point is not aspirational, then there is little point in clinging to it, and a new heuristic starting point should be established.

IV. CONCLUSION

I am thankful to be invited to add my own observations to such a fantastic topic. Professor Hillman's observation that contracts people keep repeating things that we know aren't accurate calls into question some long-standing and often-taught principles of contract law. While I disagree with some of Professor Hillman's observations, it is more in degree than an absolute opposition. Some of what Professor Hillman labels lore, such as that we give primacy to the intention of the parties, are truer than others, such as the statement that expectation damages will put the aggrieved party in as good a position had the other party not breached. Hillman offers as an explanation that contract lore are really expressions of aspiration and that cognitive dissonance could explain the persistence of lore. As with his lore description, I disagree in degree and believe that while some statements may be strong expressions of aspiration, others are not.

As an alternative, I believe that all of the observations made by Professor Hillman can more easily be explained as heuristic starting points. Heuristics provide a framework for problem-solving, and these observations are simply a tool to assist contract people in solving contracts problems. Not only are these observations important as

Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465, 466 (1987) (discussing Llewellyn's central position in legal realism and his influence on the drafting of the Uniform Commercial Code and his articles on sales).

151. Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1420 (2005) (memorializing Farnsworth's historic and invaluable contribution to the Restatement (Second) of Contracts); Scott D. Gerber, *An Ivy League Mystery: The Lost Papers of Arthur Linton Corbin*, 53 S.C. L. REV. 605, 612-13, 629 (2002) (discussing Corbin's influence on legal realism, specifically Karl Llewellyn as a student and Allan Farnsworth in his work on the Second Restatement); William Twining, "Looking Back Will Still Keep Us Looking Forward": *A Letter from Arthur Corbin to Soia Mentschikoff upon the Death of Karl Llewellyn*, 27 YALE J.L. & HUMAN. 201, 204-07 (2015) (stating that Corbin's influence on Llewellyn at Yale contributed significantly to Llewellyn's later work that transformed legal philosophy).

heuristic starting points, but also as *shared* starting points. Contracts people understand when they enter into contracts what set of rules will be used to interpret their words and actions *post hoc*. But though heuristics may help explain the persistence of Hillman's "lore," it does not justify it. Professor Hillman's observations call into question whether these bits of "lore" should be used as starting points at all in a legal analysis. The persistence of these as heuristic starting points may only be due to how slowly the law changes, but when a heuristic starting point is riddled with exceptions, and is of little aspirational value, then perhaps it is time to reexamine its utility.