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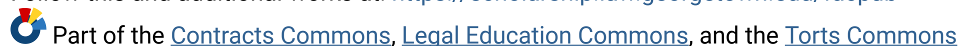

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The Death of Reliance

Randy E. Barnett

The Rise and Fall of Reliance

In his classic 1941 article, "Consideration and Form," Lon L. Fuller offered the following definition of what he called "private autonomy," which, along with the principles of reliance and unjust enrichment, constituted the substantive basis of contractual enforcement. "Among the basic conceptions of contract law," Fuller wrote,

> the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. The man who conveys property to another is exercising this power; so is the man who enters a contract. When a court enforces a promise it is merely arming with a legal sanction a rule or *lex* previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature. It is, in fact, only a kind of political prejudice which causes us to use the word "law" in one case and not in the other, a prejudice which did not deter the Romans from applying the word *lex* to the norms established by private agreement.[1]

In the 1950s, 1960s, and 1970s this view of contracts went into a steep decline.

By the time I took Contracts in the mid-1970s, it was an article of faith that contract was not properly conceived as a means by which persons could, by their own choice, make law for themselves to govern their relations. Instead, contract was thought best conceived as the rectification of injuries persons may have caused by their verbal conduct in much the same way that persons have a duty to rectify the injuries caused by their physical acts. With contracts, these injuries consisted of detrimental reliance on the words of another. So conceived, both contract and tort duties are imposed by law, and do not arise from the parties' consent. Thus contract law is conceptually indistinguishable from tort law.

The doctrinal implications of this reliance-based conception of contract were twofold. First, since duties were imposed by law rather than being the product of the parties' consent, we need not concern ourselves with many of

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1. 41 Colum. L. Rev. 799, 806–07 (1941).

the niceties of finding mutual assent in the formation stage. Second, if reliance was the basis of contract, then the normal expectation measure of recovery was also suspect—justified, if at all, as an indirect way to protect what Fuller and Perdue labeled the "reliance interest."[2] Indeed, it says much about the conventional wisdom during the 1960s and 1970s that Fuller and Perdue's justly esteemed 1936 article, "The Reliance Interest in Contract Damages," received far greater attention than Fuller's later "Consideration and Form."[3]

This thesis that contract primarily concerns rectifying detrimental reliance was bolstered by two claims contained in Grant Gilmore's classic 1974 monograph, *The Death of Contract*.[4] The first was historical: contract law had been artificially separated from tort law in the nineteenth century through the creative efforts of Christopher Columbus Langdell and Oliver Wendell Holmes.

> Speaking descriptively, we might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort." Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again.[5]

In a footnote to this passage Gilmore observes:

> It is an historical truism that assumpsit, from which our theories of contract eventually emerged, was itself a split-off from the tort action of trespass on the case. Until the late nineteenth century the dividing line between "contract" and "tort" had never been sharply drawn.... No doubt the obscure realization that contract (or assumpsit) had its origins in tort accounted, at least in part, for the failure to make a clear distinction between contract and tort until the nineteenth century theorists insisted on drawing the line.[6]

Gilmore's second claim was doctrinal: incorporating the reliance-centered section 90 introduced a contradiction into the Restatement of Contracts. This contradiction would ultimately be resolved as reliance-based obligation imposed by law overwhelmed any distinct concept of contract as consent-based obligations originating with the parties. Once again, Gilmore made this point most colorfully:

> We have become accustomed to the idea, without in the least understanding it, that the universe includes both matter and anti-matter. Perhaps what we have here is Restatement and anti-Restatement or Contract and anti-Contract. We can be sure that Holmes, who relished a good paradox, would have laughed aloud at the sequence of § 75 [expressing the bargain theory of

2. See Lon L. Fuller & William R. Perdue, The Reliance Interest in Contract Damages (pt. 1), 46 Yale L.J. 52 (1936).

3. A Westlaw search of articles in the Journals and Law Reviews database that I conducted on November 12, 1996 (unfortunately limited to articles dating from 1981) reveals that "The Reliance Interest" is cited in nearly twice as many articles (223) as "Consideration and Form" (120). My search strings were (Fuller /s "Consideration and Form") and (Fuller /s Perdue).

4. Columbus, Ohio, 1974.

5. *Id.* at 87.

6. *Id.* at 140 n.228.

> consideration] and § 90. The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.[7]

Gilmore's view that contract and tort were artificially separated and that contract would ultimately collapse into a reliance-based tort reflected the views of many enlightened contracts scholars of his day. All the professors who taught today's law professors Contracts, as well as the author of whatever casebook was used, accepted the view that promissory estoppel was a reliance-based doctrine that should either supplement—the view of the Restatement (Second)—or supplant—the view of many contracts scholars—the bargain theory of consideration. What today's law students may know—and law professors who teach in fields other than contracts should too—is that this received wisdom has been called into question in the 1980s and 1990s and is in decline.

Gilmore's historical argument that contract was a nineteenth-century offshoot of tort, though widely accepted, was always a curious half-truth. True, "[u]ntil the late nineteenth century the dividing line between 'contract' and 'tort' had never been sharply drawn,"[8] as Gilmore said, but that was because until the mid-nineteenth century causes of action were determined by forms of action, not concepts such as contract *or* tort. As G. Edward White noted in his 1977 article, "The Intellectual Origins of Torts in America":

> The emergence of Torts as an independent branch of law came strikingly late in American legal history. Although Blackstone and his contemporaries, in their 18th-century efforts to classify law, identified a residual category of noncriminal wrongs not arising out of contract, Torts was not considered a discrete branch of law until the late 19th century. The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874.[9]

Indeed, virtually *all* the concepts, categories, and distinctions we now use to understand causes of action were "invented" or developed in the nineteenth century to serve as a substitute for the forms of action which had defined causes of action for centuries. Thus it is as anachronistic to refer to assumpsit as a "tort" action as it is to refer to debt, detinue, or covenant as "contract" actions. All may be so categorized only by applying concepts developed in the late nineteenth century. Contract law no more grew out of torts than did tort law grow out of contracts.[10]

7. *Id.* at 61.

8. *Id.* at 140 n.228.

9. 86 Yale L.J. 671, 671 (1977). White attributes this development to increased conceptualization among American intellectuals, the collapse of the writ pleading system, and the industrial trend in torts cases from disputes between persons in closely defined relationships to disputes between strangers. *Id.* at 672.

10. It is true that assumpsit was originally a writ that corresponds to what we would today think of as a tort. But by the early seventeenth century it had been deliberately changed to enable the more ready enforcement of informal contractual agreements. This change necessitated the invention later in the seventeenth century of the doctrine of consideration and the passage of the Statute of Frauds. All this occurred long before the abolition of the writ system and the births of Holmes and Langdell.

The contention by Gilmore and others that a solely reliance-based, tort-like conception of contract would eventually completely supplant a consent-based conception should always have been more suspect than it was. After all, as early as 1933 Morris R. Cohen observed: "Contractual obligation is not coextensive with injurious reliance because (1) there are instances of both injury and reliance for which there is no contractual obligation, and (2) there are cases of such obligation where there is no reliance or injury." Tellingly he noted: "Clearly, not all cases of injury resulting from reliance on the word or act of another are actionable, and the theory before us offers no clue as to what distinguishes those which are."[11]

Somewhat amazingly, given the widespread sympathy for a reliance-based conception of contract, from the 1930s to the 1970s no contracts scholar ever published a comprehensive explication of a reliance theory of contract of the kind that Charles Fried had attempted—unsuccessfully in my view[12]—for the "will theory" in his 1981 book, *Contract as Promise.*[13] I would speculate that many such efforts were begun, but all were quietly abandoned because there was simply no way to accomplish such a project.

By the 1980s, it had begun to be realized that the much-ballyhooed reliance revolution in contract law was not to be. In "Developments in Contract Law During the 1980's: The Top Ten," E. Allan Farnsworth observed: "The expansion of the role of reliance . . . did not continue in the 1980s. Indeed, . . . the trend appears to be in the other direction."[14] As he elaborated:

> The 1980s . . . did not witness the death of contract. Academic attempts to merge contracts into torts in courses called "contorts" failed to flourish and it may be argued that contracts, through liberal application of third party beneficiary doctrine, invaded the domain of tort during the 1980s . . . .
>
> Indeed, as early as the 1981 Association of American Law Schools conference, Justice [Abrahamson] of the Wisconsin Supreme Court reported that contracts was "viable as a litigation category" and that Gilmore's report of the death of contract was highly exaggerated. At the same conference, Gilmore himself attempted to provide "an explanation of why this field of law, which somebody or other said was dead, some time ago, is not only alive and well but bursting at the seams."[15]

The 1980s also witnessed a scholarly reexamination of the doctrine of promissory estoppel by an ideologically diverse group of contract scholars to see if it could be integrated into a comprehensive theory of contract, rather than used as a fulcrum to move contracts into torts. These scholars include Mary Becker, Daniel Farber, Juliet Kostritsky, John Matheson, Steve Thel, Edward Yorio, and me—all but one of whom were students when Grant

11. The Basis of Contract, 46 Harv. L. Rev. 553, 579 (1933).

12. See Randy E. Barnett, Some Problems with Contract as Promise, 77 Cornell L. Rev. 1022 (1992).

13. Cambridge, Mass., 1981.

14. 41 Case W. Res. L. Rev. 203, 219–20 (1990).

15. *Id.* at 221–22 (citing Charles D. Kelso, The 1981 Conference on Teaching Contracts: A Summary and Appraisal, 32 J. Legal Educ. 616, 616, 640 (1982)).

Gilmore published *The Death of Contract* in 1974.[16] Each reached remarkably similar results after surveying massive numbers of promissory estoppel cases. In the balance of these comments, I will describe the findings of these scholars—findings which have formed the basis of a new consensus that the doctrine of promissory estoppel is not primarily about compensating detrimental reliance.

The New Consensus

To appreciate the nature of the new consensus, it is necessary to clarify an important ambiguity in the reliance conception of contract. There are two ways that reliance may figure in contract. The first is the tort-like conception of contract in which the *inducement of detrimental reliance* may be held to justify a remedy to compensate for the detriment incurred, in the same way that the infliction of physical harm justifies a remedy in tort. The second is that contracts are viewed as protecting one party's *right* to rely on the commitment of another. Although prior scholarship sometimes blurred these two conceptions, the difference between them is crucial. According to the first, it is the existence of detrimental reliance or injury that justifies the enforcement of a contractual obligation. According to the second, it is the existence of a contractual obligation that justifies reliance. Thus according to the first we enforce contracts because reliance on the promises of another has occurred while, according to the second, one reason we enforce contracts is to enable parties to rely in confidence on each other's promises.

While the second of these two conceptions views the protection of reliance as one end or purpose of contract law, reliance is protected only when there is a contract, so the existence of detrimental reliance alone does not tell you when reliance will be protected. What must be shown is that an enforceable commitment had been made. Traditionally, to be enforceable a commitment must have been bargained for. The new consensus on promissory estoppel views the doctrine as expanding enforcement beyond the requirement of a bargain by identifying an additional factor or factors which justify enforcement. When (and only when) such factors exist, reliance will be protected.

The first, and to my mind still the best, article to reach this conclusion was Daniel A. Farber and John H. Matheson's "Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'" (1985). They introduced their thesis as follows:

> As every law student knows, promissory estoppel is based on detrimental reliance. Law students share this idea with the American Law Institute and with treatise writers. Indeed, promissory estoppel is one of the few points of agreement between the critical legal scholars on the left and the law and economics writers on the right. Both agree that reliance has been the foundation of promissory estoppel, and both accuse the courts of incoherence in applying the doctrine.

16. The late Edward Yorio graduated from law school in 1971. Daniel Farber graduated in 1975; John Matheson and I graduated in 1977; Steve Thel graduated in 1979; Mary Becker and Juliet Kostritsky graduated in 1980. Michael Kelly, whose critique of the reliance interest in contract damages is discussed below, graduated in 1983.

> We have recently surveyed over two hundred promissory estoppel cases decided in the last ten years. Our conclusion is that reliance is no longer the key to promissory estoppel. Although courts still feel constrained to speak the language of reliance, their holdings can best be understood and harmonized on other grounds.
>
> ....
>
> In our view, the expansion of promissory estoppel is not, as some have argued, proof that contract is in the process of being swallowed up by tort. Rather, promissory estoppel is being transformed into a new theory of distinctly contractual obligation.[17]

Farber and Matheson's survey of promissory estoppel cases led them to four conclusions about how the doctrine was used. First: "Despite its tentative origins and its initial restriction to donative promises, promissory estoppel is regularly applied to the gamut of commercial contexts."[18] Second, "promissory estoppel is no longer merely a fallback theory of recovery. Rather, courts are now comfortable enough with the doctrine to use it as a primary basis of enforcement."[19] Third, "reliance plays little role in the determination of remedies . . . . [R]ecent cases are heavily weighted towards the award of full expectation damages. The amount of awards for lost profits may be substantial. Courts are also willing to grant equitable remedies, such as specific performance or injunctive relief, in cases decided on a promissory estoppel theory."[20] Finally, and perhaps most important for present purposes, they found a "diminished role of reliance in determining liability. The essential requirement for liability on a promissory estoppel theory has traditionally been some specific action in justifiable reliance on the promise. This requirement of an identifiable detriment no longer defines the boundary of enforceability."[21]

What then did Farber and Matheson contend explains enforcement in the promissory estoppel cases they studied? While their complete account was complex, they found that

> [p]romise-making is the linchpin of liability under both traditional contract doctrine and promissory estoppel. The requirement of a promise makes liability turn on the voluntary assumption of duty, and thus underlies the function of contract law as a promoter of voluntary agreements. But courts have long had trouble distinguishing binding commitments from other communications such as opinions, predictions, or negotiations.[22]

In promissory estoppel cases, two factors appear to coalesce to enable the courts to find that a binding promise has been made:

17. 52 U. Chi. L. Rev. 903, 903–05 (1985) (footnotes omitted).
18. *Id.* at 907 (footnotes omitted).
19. *Id.* at 908.
20. *Id.* at 909–10 (footnotes omitted).
21. *Id.* at 910 (footnote omitted).
22. *Id.* at 914–15.

> First, . . . the promisor's primary motive for making the promise is typically to obtain an economic benefit. Second, the enforced promises generally occur in the context of a relationship that is or is expected to be ongoing rather than in the context of a discrete transaction. These relationships are characterized by a need for a high level of mutual confidence and trust.[23]

They proposed a new revised rule of promissory obligation that "commitments made in furtherance of economic activity should be enforced." In their view, such a rule would acknowledge

> the fundamental fact that commitments are often made to promote economic activity and obtain economic benefits without any specific bargained-for exchange. Promisors expect various benefits to flow from their promise-making. A rule that gives force to this expectation simply reinforces the traditional free-will basis of promissory liability, albeit in an expanded context of relational and institutional interdependence.[24]

In 1987 Mary E. Becker and I published an article that reached very similar conclusions. For us, one of the problems with the reliance theory of promissory estoppel was, to borrow a phrase from Brian Simpson, its "doctrinal monism."[25] That is, it sought a single explanation for a category of cases whose only common characteristic was the absence of a bargain. Instead, we argued that "promissory estoppel serves two of the functions served by traditional contract and tort remedies available to parties in consensual relationships: the enforcement of some promises intended as legally binding and the imposition of liability to compensate for harm caused by some misrepresentations."[26]

Like Farber and Matheson, we argued that promissory estoppel was used to enforce serious promises when the formality of a bargain was lacking, though we defined "serious" as manifesting an intention to be legally bound and identified a variety of circumstances that evidence this intent even in the absence of a bargained-for exchange.[27] In addition, we argued that a few

23. *Id.* at 925.

24. *Id.* at 929. In the appendix to this article I offer a doctrinal alternative to the current Restatement scheme that takes their proposal as its starting point.

25. A. W. B. Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpsit 325 (Oxford, England, 1975) ("[T]here has always in the common law been a tendency towards a sort of doctrinal monism—there must be *one* test for the formation of contract (offer and acceptance), *one* principle governing possession, *one* test for the actionability of promises.").

26. Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443, 445–46 (1987). Although it was published after Farber and Matheson's article, Mary and I first drafted our thesis in the summer of 1983.

27. We distinguished between promises made in donative settings and those made in commercial settings, and we discussed factors in each which lead a reasonable promisee to conclude that the promisor has manifested an intention to be legally bound. In the donative setting we discussed formal promises to charities and reliance that had been either invited or observed by promisor. In the commercial setting, we discussed implicitly bargained-for reliance, firm offers, contract modifications, assurances likely to be regarded as part of overall transaction, and promises of pensions at or near retirement. We also discussed when promissory estoppel is used to avoid the formal requirements of the Statute of Frauds, the parol evidence rule, and the doctrines of indefinite or illusory promises.

promissory estoppel cases—including the famous cases of *Goodman v. Dicker*[28] and *Hoffman v. Red Owl Stores*[29]—are not best explained as the contractual enforcement of a voluntary assumption of obligation. Rather they are tort based, either because there was a negligent factual misrepresentation (e.g., *Goodman)* or because the promisor negligently misrepresented the reliability of the promise (e.g., *Red Owl).* Traditionally, tort liability for promissory misrepresentation is normally limited to promises that are "lie[s] when made."[30] We proposed expanding misrepresentation doctrine to include negligent promissory representation to mirror the expansion of factual misrepresentation that now includes negligent representations as well as lies when made.

In 1991 our findings and those of Farber and Matheson were confirmed once again by Edward Yorio and Steve Thel in "The Promissory Basis of Section 90." After surveying yet another set of cases, they concluded that

> courts may enforce a promise under Section 90 in the absence of reliance or detriment. Conversely, courts may not enforce a promise under the section despite detrimental reliance by the promisee. Both results are inconsistent with a reliance-based theory . . . . [T]he critical question for courts under Section 90 is which promises to enforce, not what remedy to award or how to protect reliance. A promise will be fully enforced under the section if the promise is proven convincingly and is likely to have been serious and well considered when it was made.[31]

Perhaps the most important confirmation of this new consensus on promissory estoppel was provided by Jay M. Feinman, the foremost critical legal studies contract scholar. Feinman had broken into the contract law scene in 1984, the year before Farber and Matheson's article appeared, with "Promissory Estoppel and the Judicial Method," the last major article to trumpet the significance of promissory estoppel as a reliance-based contradiction which undermined the coherence of contract. There he stated: "The scope of promissory estoppel doctrine is determined not only by the application of the reliance principle, but also by the resolution of conflicts between that principle and other principles of contract law."[32]

In 1992, however, Feinman published "The Last Promissory Estoppel Article," in which he discusses each of the studies I have summarized here. In a striking confession and avoidance, he now contends that "promissory estoppel is no longer an appropriate doctrine, given recent developments in the wider scheme of contract law and theory, and thus it is time to move on. Indeed, we ought to abandon not only promissory estoppel but also the framework of

28. 169 F.2d 684 (D.C. Cir. 1948).

29. 133 N.W.2d 267 (Wis. 1965).

30. See Barnett & Becker, *supra* note 26, at 486.

31. 101 Yale L.J. 111, 113 (1991). Though their article did confirm earlier work, Yorio and Thel can, perhaps, be faulted for not offering a theory as to what constitutes a "serious" promise, something both Farber/Matheson and Becker/Barnett attempted to do.

32. 97 Harv. L. Rev. 678, 695 (1984).

contract thinking that has given it vitality."[33] That he would replace the traditional framework with what he calls a more "relational approach"[34] is less important for present purposes than the fact that he fails to challenge the accuracy of the scholarship which contends that reliance is dead as a theory of promissory estoppel.[35]

There is one respect in which the reliance principle remains alive in contract law scholarship. The extent of detrimental reliance is still viewed as an appropriate fallback measure of contract damages when, for some reason, the expectation interest cannot be calculated—for example, when lost profits are too uncertain. Yet even this use of reliance has been called into question in an article by Michael B. Kelly. In "The Phantom Reliance Interest in Contract Damages," Kelly argues that although courts appear to be using the reliance interest when expectation damages are uncertain, either they are not doing so or they are awarding the wrong measure of damages.[36] What courts do, or should do, in such circumstances is to award the expectation interest on the assumption of zero profits unless the victim of the breach proves the existence of lost profits or the party in breach proves that the contract was a losing one. Kelly writes:

> The goals of the reliance interest may be better served if we banish the language of reliance from discussions of contract damages. With very few (and fairly minor) exceptions, the expectation interest meets the normative goals set by the reliance interest—at least in those cases where courts have

33. 61 Fordham L. Rev. 303, 304 (1992). In addition to the studies I have summarized here, Feinman discusses another article advocating an assent-based conception of promissory estoppel doctrine: Juliet P. Kostritsky, A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel, 33 Wayne L. Rev. 895 (1987). Feinman, *supra*, at 310–11.

34.
> I propose that contract law should take one step beyond Farber and Matheson and embrace a truly relational analysis. This relational approach would constitute revolutionary science, rather than a further attempt to refine the normal science of neoclassical law. As particularly relevant ty promissory estoppel, this move would replace the neoclassical elements of a focus on promise and a baseline of limited liability with the ideas that relationships are both different from, and more common than, discrete transactions. Furthermore, relationships necessarily involve obligations; the only questions are what kinds of obligations different relationships involve and which of those obligations should be translated into legal obligations.

Feinman, *supra* note 33, at 311.

35. True, Feinman can rightly claim to have always advocated transcending the consideration/ promissory estoppel dichotomy. But the justification for this transformation used to be the tension or contradiction between the bargain theory of consideration and the reliance-based doctrine of promissory estoppel. Now that contracts scholars have eroded the traditional dichotomy by dispelling the notion that promissory estoppel is reliance based, Feinman's justification for transcending the doctrine is that it is insufficiently "relational." But there is more than one view of what a relational approach entails. See Randy E. Barnett, Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract, 78 Va. L. Rev. 1175 (1992) (distinguishing liberal from communitarian relational theories and criticizing the latter).

36. 1992 Wis. L. Rev. 1755. Kelly disapproves of the court's unwillingness in Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932), to award damages for expenses incurred before the contract was executed because, in the view of the court, there could have been no reliance on a promise that had yet to be made. He approves of the outcome of Anglia Television Ltd. v. Reed, [1972] 1 Q.B. 60 (C.A. 1971), in which the court awarded damages for precontractual expenses. According to Kelly the outcome of one of these cases must be wrong.

> shown any inclination to base recoveries on reliance at all. We need only fix recoveries at the level of zero profit unless one party can prove that performance would have produced profits or losses. This presumption of zero profit captures the essence of existing contract law. In addition, the presumption can clarify and add consistency to the judicial treatment of precontract expenses and unallocated overhead.[37]

In this way, victims of breach would be able to recover even those expenses which they incurred before entering into the contract absent proof that they would have lost money on the transaction.[38]

Beyond the Second Restatement: A Reform Proposal

Notwithstanding the scholarly consensus about what the courts are really doing and what they ought to do, I am not hopeful that courts will soon move beyond the traditional bargain theory/promissory estoppel dichotomy.[39] The reason for this is the effect of the Restatement (Second) of Contracts. Courts are increasingly treating the Restatement as a statute. Judges typically look to the Restatement, rather than to even very practical and accessible legal scholarship, to ascertain the prevailing contract doctrine. They are unwilling to move beyond the safe-haven framework it provides. Thus, though the Restatement undoubtedly hastened the improvement of contract doctrine in some areas, it has also served to stultify further improvement.

For this reason, what students may know and law professors probably should know about the death of reliance is probably unknown to judges. Judges may do in practice what these scholars describe them as doing, but they are not aware of it. Perhaps this should cause us to stop and reflect on the merits of the Restatement movement as a means of supplanting a true common law process of legal development. At a minimum, it might cause us to advocate, as Thomas Jefferson did with respect to the Constitution, a revolution every generation or so. Perhaps it is time to revise the Restatement of Contracts to reflect the new consensus.

To that end Farber and Matheson proposed in their article the following replacement for the current doctrinal scheme: "A promise is enforceable when made in furtherance of an economic activity."[40] To this I have added three more sections.[41] In contrast to the "death of contract" approach of Grant

37. Kelly, *supra* note 36, at 1845–46.

38. Kelly concludes that

> [a] unified measure of damages focusing on the expectation interest with a presumption of zero profit offers some advantages over a remedial structure involving alternative remedies. The unified structure maintains a single, familiar approach. It avoids issues of election of remedies. It avoids confusion regarding overlapping remedies. It minimizes concern for strategic choices among remedial alternatives. And it helps judges focus on a single objective.

Id. at 1838.

39. That is why this article is entitled "The Death of Reliance" and not "The Death of Promissory Estoppel."

40. Farber & Matheson, *supra* note 17, at 930.

41. See Randy E. Barnett, Contracts: Cases and Doctrine 904–15 (Boston, 1995).

Gilmore, my proposed sections, which appear as an appendix to this article, preserve the traditional distinction between contract and tort as well as between contract and restitution. They distinguish between commercial and noncommercial promises. Commercial promises are presumptively enforceable unless the parties, by using formalities, indicate their intention not to be legally bound. In contrast, noncommercial promises are presumed to be unenforceable unless the parties formally manifest their intention to be legally bound. Another section identifies when the existence of detrimental reliance can manifest to a promisee the promisor's intention to be legally bound.

My proposed doctrinal scheme attempts to facilitate both aspects of freedom of contract—freedom *to* contract and freedom *from* contract[42]—by setting the background presumption in a manner that reflects the tacit understanding of most persons.[43] With commercial promises, freedom *to* contract is facilitated by presuming such contracts to be enforceable, while enforcing the parties' expression of their intention not to be legally bound respects their freedom *from* contract. With noncommercial promises, the parties' freedom *from* contract is facilitated by presuming such contracts to be unenforceable, and enforcing the parties' expression of their intention to be legally bound respects their freedom *to* contract. The differential treatment of promises made in these two distinct contexts reflects the comparative likelihood that parties in each context intend to be legally bound by their promises.

While this doctrinal scheme is far from simple (and I welcome suggestions for its improvement), perhaps the primary source of the weakness of section 90 as a rule of law was the idea (espoused by Gilmore and many others) that the cases embraced by the doctrine of promissory estoppel could be explained simply by the concept of detrimental reliance. Ironically, this sentiment is remarkably similar to the common law's monistic preference for a single criterion of enforceability. Perhaps in this instance—to paraphrase Gilmore—multiplication *is* preferable to division.[44]

42. See Richard E. Speidel, The New Spirit of Contract, 2 J.L. & Com. 193, 194 (1982) ([T]he law of contracts . . . constantly reflects the tension between 'freedom to' and 'freedom from.'"); see also Randy E. Barnett, The Sound of Silence: Default Rules and Contractual Consent, 78 Va. L. Rev. 821, 869–73 (1992) (explaining and justifying this distinction while attempting to reconcile the tension).

43. For an argument that this is how the default rules of contract law ought to be determined, see Barnett, *supra* note 42, at 874–94.

44. See Gilmore, *supra* note 4, at 89 ("[T]he legal mind has always preferred multiplication to division.").

Appendix
Restatement (Third) of Contracts

§ 71A. Enforceability of Commercial Promises[1]

A promise is enforceable when made in furtherance of an economic activity.

Comment:

a. Rationale and relation to other rules. This section deals with what has traditionally been called consideration—namely, the legal conclusion that a promise is enforceable. Prior rules tested every promise or modification to determine whether the promise was conditioned on some tangible bargained-for exchange. The present section eliminates the need for finding a specific bargained-for promise or performance for each promise or modification. Rather, the key determination is whether the promise is designed to induce the creation of or to aid in the continuation of economic activity. The rule posits the social and economic utility of promises made in furtherance of economic activity.

The term "economic activity" includes sales of goods and services, leases, loans, insurance and employment arrangements, and similar transactions, whether involving businesses or individuals. The operations of organized charities are considered economic activities for purposes of this section. The requirement that the promise be "in furtherance" of the economic activity carries the implication that the promisor must expect a benefit to result from the promise. This expectation of benefit is to be demonstrated on the basis of an objective standard, and may often be presumed from the circumstances.

If the requirement of promise in furtherance of economic activity is met, there is no additional requirement of (1) a gain, advantage, or benefit to the promisor or a loss, disadvantage, reliance, or detriment to the promisee; (2) equivalence in the values exchanged; or (3) mutuality of obligation. Further, many of the promises denominated under the Restatement, Second, of Contracts as without consideration would be enforceable under this section if they occur in furtherance of economic activity. See, e.g., Restatement, Second, of Contracts § 87 (options contracts), § 88 (guarantees), § 89 (modifications), § 90 (promises enforced

1. This section is taken from Farber & Matheson, *supra* note 17, at 930–34. They numbered their proposal § 71 and entitled it "The Enforceability of Promises." Other changes or additions I have made to their original proposal are indicated by brackets. In addition, all footnotes from the original have been omitted. I make no claims that Farber or Matheson endorses either the additional hypothetical sections that appear here or the linkage of these sections to their original proposal.

on the basis of reliance). Modern courts have made significant strides toward accomplishing the effect of this section by expanding the notion of the performance required for creation of a unilateral contract or by diluting the concept of reliance in promissory estoppel situations.

Illustrations:

1. A and B were employed as truck drivers for C. A and B formulated a plan to become independent truck owners but still continue driving for C. C gave A and B assurances of long-term employment and a sufficient amount of work to enable them to make payments on the trucks they purchased. After A and B purchased the trucks, C refused to honor its commitment and terminated A and B. C's promise is binding and A and B are entitled to damages without regard to whether C's promises were "bargained for" or whether A and B provided anything in exchange for C's promises.

2. A, a long-time employee of B, accepts a promotion to a salaried position. At the time of promotion, B promised A that A would get pension credit for several of his previous years of service as an hourly employee not otherwise covered under the pension plan. When A retired, B refused to credit A's pension for the earlier period. B's promise is binding even though the express terms of the pension plan denied A credit for the earlier period, and without regard to whether A can show detriment or disadvantage.

3. A and B are former husband and wife operating under a court-ordered dissolution decree and settlement agreement. After A is $7800 in arrears on required payments, he and B agree that B will accept immediate $1000 partial payment plus A's promissory note for $3500 as full satisfaction of the outstanding obligation. Subsequently B brings suit for the full delinquent amount and A interposes the modified agreement as a defense. Because the promise was not made in furtherance of any economic activity, B's promise to accept less is not binding under this section. However, the promise may be enforceable under other principles of contract law. See, e.g., Restatement, Second, of Contracts § 73 (performance of legal duty), § 74 (settlement of claims), § 89 (modification of executory contract) [,Restatement, Third, of Contracts § 71B (enforceability of noncommercial promises), § 71C (enforceability of promises by virtue of reliance)].

4. Corporation A prepared a bid for leasing a computer to Corporation B. A was running behind schedule and asked an agent of B to pick up the bid at the airport. The agent, after agreeing to pick up the bid, declined to do so and the bid arrived too late for consideration. Assuming the agent acted within his actual or apparent authority, B is bound by the agent's representation. If A can show that it would have been awarded the lease, it can recover lost profits.

[5. A promises not to revoke an offer to sell linoleum to B at a particular price for a period of 90 days in a writing reciting a purported consideration of $1.00. A's offer is irrevocable whether or not B relies upon it.]

b. Promises, acts and resulting relations. This section requires that a promise have been made. A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. A promise may be stated in words, either orally or in writing, or may be inferred wholly or partly from conduct. Compare Restatement, Second, of Contracts §§ 18–19 (manifestation of assent). Both language and conduct are to be understood in the light of the circumstances, including course of performance, course of dealing, or usage of trade.

Illustration:

[6]. A leased property from B under a ten-year agreement, with an option for A to renew upon written notice for each of six additional five-year periods. During the second extension B died and C became trustee of B's estate. B had twice extended the lease on oral notice. C cannot enforce the contract provision requiring written notice if, under all the surrounding circumstances, a reasonable person in A's position would believe that B had committed himself to accepting oral notice.

c. Opinions and predictions. A promise must be distinguished from a statement of opinion or a mere prediction of future events. Whether manifestations rise to the level of a promise depends on various factors, including the clarity of the manifestations, the nature of the relationship between the parties, and the circumstances surrounding the manifestations. [See Restatement, Third, of Contracts § 71D (intention to create legal relations).] . . .

d. Agency limitations. Many promises that might otherwise be actionable under this section occur in a context where the party making the manifestations has neither actual nor apparent authority to bind the principal to the manifestations. See Restatement, Second, of Agency §§ 7, 8. Such lack of authority is particularly likely in large organizations where the manifestations are made by non-policymaking employees. The more substantial the hierarchical structure, the less likely that such manifestations represent authorized commitments. On the other hand, where such manifestations come to the attention of the principal and no effort is made to clarify or disavow them, the principal may be bound by the promises on the basis of affirmance or ratification. See Restatement, Second, of Agency §§ 82, 83.

Illustration:

[7.] A, a retail sales employee for a large department store chain, B, was told by her superior, C, that A would not be discharged except for just cause. Enforceability of this representation depends

upon C's actual or apparent authority to bind B, or, absent such authority, upon conduct reflecting B's affirmance or ratification of such representations.

§ 71B. Enforceability of Noncommercial Promises

(1) A promise not made in furtherance of an economic activity is binding if the promise is in writing that is signed by the promisor and either

(a) is under seal, or

(b) recites a nominal consideration, or

(c) contains an expression of intention to be legally bound, or

(d) is also signed at the same time by the promisee.

(2) A promise not made in furtherance of an economic activity that fails to meet the requirements of (1) is not ordinarily binding.

Comment:

a. The role of formalities in determining enforceability. As recognized in § 71A, in commercial settings there is a presumption that serious informal commitments for which parties expect to receive a reciprocal benefit are intended to create or alter legal relations. In contrast, in noncommercial settings, even informal commitments for which persons expect to receive a reciprocal benefit are unlikely to be intended by them to be legally binding.

When such commitments are accompanied by a formality that performs both evidentiary and cautionary functions, however, this commitment should presumably be legally binding. Consequently, this section provides that writings which are either under seal, recite a nominal consideration, contain an expression of intention to be legally bound, or are contemporaneously signed by both parties may perform a channelling function for persons seeking to bind themselves legally. Compare Uniform Written Obligations Act § 1.

Conversely, persons in social relationships need, in the words of Lon Fuller, "a field of human intercourse freed from legal restraints," where they "may without liability withdraw assurances once given." To protect this "domain of free-remaining relations," this section limits enforcement to written promises that are made in such a way as to manifest an intention to be legally bound. However, in rare situations, noncommercial promises that fail to satisfy the formal requirements of this section may be enforceable under Restatement, Third, of Contracts § 71C or § 71D.

Illustrations:

1. An uncle promises in a signed writing to pay his niece $5,000 on condition that she quit her job. If the writing is under seal or was

signed by the niece at the same time as her uncle, the promise is enforceable.

2. An uncle orally promises to pay his nephew $5,000 on condition that the nephew refrain from smoking. Later, in a signed letter to the nephew, he acknowledges having made the promise. The promise is not enforceable.

3. A is the parent of B. A promises B in writing to give her a car worth $10,000 "in return for valuable consideration of $1.00." A's promise is enforceable.

4. A and B are living in the same household and are in an intimate sexual relationship. A, an executive, orally promises B, a musician, to support him for the rest of her life. The promise is unenforceable regardless of whether B relies on the promise.

5. A promises in writing to pay to his daughters an amount equal to that which their mother left to him in her will. He also states in the writing that he "intends to be legally bound." The promise is enforceable.

6. A promises to donate $5,000 to B, a religious college, in a signed writing that includes the statement that, "I hereby intend to be legally bound." A's promise is enforceable regardless of whether B relies upon it.

§ 71C. Enforceability of Promises by Virtue of Reliance

(1) Detrimental reliance upon a promise is neither essential to the formation of a contract nor sufficient to justify enforcement of a promise.

2) Nonetheless, a promise is enforceable by virtue of reliance when

(a) with the knowledge of the promisor, a promisee substantially relies upon it in a way that would be unlikely in the absence of a manifested intention by the promisor to be legally bound, and

(b) the promisee is aware that the promisor has knowledge of the promisee's reliance, and

(c) the promisor remains silent concerning the promisee's reliance.

Comment:

a. Detrimental reliance. When the circumstances described in §§ 71A and 71B exist, there frequently will be detrimental reliance on the promise in question. Such reliance, however, is unnecessary to support a recovery. When these circumstances are absent, whether a promisor intends to be legally bound is often ambiguous, in which case the promise

would ordinarily be unenforceable, despite the existence of detrimental reliance.

b. When reliance alone justifies enforcement of a promise. This section is intended to supplement §§ 71A and 71B by adding to the bases of enforceability those circumstances in which the existence of very substantial reliance is itself persuasive evidence that a promisor intended his promise to be binding. When a promisee makes large expenditures in reliance on a promise of a size that would not ordinarily be made in the absence of a legally binding commitment by the promisor and the promisee knows that the promisor is aware of these expenditures, by failing to warn or discourage the promisee from so relying the promisor's silence communicates an intention to be legally bound. Compare Restatement, Second, of Contracts § 69 (when silence constitutes an acceptance). In sum, the existence of these circumstances resolves the ambiguity that may have existed at the time the promise was made as to the contractual intentions of the promisor and justifies enforcing the promise.

Illustration:

1. A promises to convey to B, her son, a parcel of land for farming. B moves on the land and makes substantial improvements to it with the knowledge of A. A remains silent while B improves the land. A's promise is enforceable.

§ 71D. Intention to Create or Alter Legal Relations

(1) To be legally enforceable as a contract, a promise must be made in such a way as to manifest the promisor's intention to be legally bound.

(2) When the conditions of §§ 71A, 71B(1), or 71C(2) are satisfied, it is presumed that the parties intended that their commitments be legally enforced.

(3) A promisor may rebut the presumption created by (2) by showing that a reasonable person would not have understood the promisor to have intended the promise to be legally binding.

Comment:

a. The requirement of intention to be legally bound. Promises are enforceable as contracts only if they are made in such a manner as to manifest the intention of the promisor to be legally bound. Since intentions are necessarily hidden from view, this element of enforceability must be established circumstantially by interpreting the normal meaning of a person's verbal and nonverbal behavior in a particular context or setting. Compare Restatement, Second, of Contracts § 87(a) (option contract enforceable when in the form of a signed writing reciting a purported consideration); § 88(1)(a) (written guaranty enforceable when signed by the promisor and reciting a purported consideration); § 90(2) (enforcing

charitable subscriptions and marriage settlements without proof of reliance), and Uniform Commercial Code § 2-204 (agreements with open terms enforceable "if the parties have intended to make a contract"); § 2-205 (enforcing "firm offers" without consideration).

b. Proving the intention to be legally bound. §§ 71A, 71B, and 71C describe circumstances from which a manifestation of intention to be legally bound can reliably be inferred. Consequently, when these circumstances are shown to exist, such an intention will be presumed. However, in a particular case, there may be other ways of establishing the existence of an intention to be legally bound in which case enforcement may be available under this section.

Illustration:

1. A is a company that has employed B for 30 years. In recognition of past services, A's board of directors passes a formal resolution promising to pay B a pension for life and B is informed of the resolution. The promise is enforceable whether or not B relies upon it.

c. Manifested intention that a promise shall not affect legal relations. As described in § 71A, with promises in commercial settings the requirement of a manifested intention to be legally bound is ordinarily satisfied by the expectation that the promisor will receive a reciprocal benefit from the promisee. As described in § 71B, with promises in noncommercial settings, this requirement is ordinarily satisfied by a formality that indicates an intention to be legally bound. Neither of these indicia of consent to be legally bound is invariably accurate, however, and may therefore be rebutted by appropriate evidence to the contrary. Compare Restatement, Second, of Contracts § 21.

Illustrations:[2]

2. A, a long-term employee with B corporation, sues for severance pay after being separated from the company. The basis of A's claim is a portion of the employee handbook entitled "Separation Allowance." The Separation Allowance section states that "[t]he inclusion of a schedule of separation allowances in the handbook, together with the conditions governing their payment, . . . is not intended nor is it to be interpreted to establish a contractual relationship with the employee." The last page of the handbook also contains an express, conspicuous disclaimer. Absent other circumstances indicating that B corporation had an express policy of not observing the stated limitations or that a reasonable employee would not have seen or understood the disclaimers, A's claim fails.

3. Physician B performed a vasectomy on his patient, A. A month after the operation B examines A and tells A that it was impossible for A to father any more children. Within a year A

2. Illustrations 2 and 3 are based on those provided in *id.* at 933–34.

impregnates his wife. B's statement, in the context of the ordinary doctor/patient relationship, should have been seen as a mere therapeutic reassurance, not a promise.

c. Other theories of recovery. The inability to justify enforcement of a promise on contractual grounds under this section and §§ 71A, 71B, and 71C does not preclude recovery on other grounds, such as those provided by the law of torts and restitution. For example, enforcement of a promise in tort may be justified on grounds of negligent misrepresentation. Or enforcement of a promise in restitution may be justified if the making of a promise in return for a previously received benefit negates the inference that the benefit was intended as a gift. Compare Restatement, Second, of Contracts § 86.

Illustrations:

4. A applies for a franchise to sell a line of electronics from B. B's employee knowingly or negligently tells A that the franchise application has been approved when in fact it has not. A may recover from B for any expenditures incurred in reliance on the employee's misrepresentation.

5. A is employed by B to repair a vacant house. By mistake A repairs the house next door, which belongs to C. A subsequent promise by C to pay A the value of the repairs is binding.[3]

6. A applies to B for a franchise for a grocery store. B's employee in good faith assures A that the application will be approved if only she supplies $25,000 cash. In reliance on this assurance A then makes expenditures in anticipation of receiving the franchise. B's employee knows that the decision as to the amount of A's cash contribution is made by another employee, that required cash contributions may vary, and that the decision as to A's cash contribution has yet to be made. Later it is decided that A must contribute $50,000. A refuses to supply this much money and her application is denied. If A was unaware of the decision-making procedure when B's employee gave his assurances, B will be liable to reimburse A for her expenditures.

7. A is severely injured while preventing a large block from falling upon B. B's subsequent promise to pay for A's medical expenses is binding.

3. This appears as illustration 4 to Restatement (Second) of Contracts § 86.