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# A Pragmatist's View of Promissory Law with a Focus on Consent and Reliance

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# A PRAGMATIST'S VIEW OF PROMISSORY LAW WITH A FOCUS ON CONSENT AND RELIANCE

ROBERT A. HILLMAN\*

## ABSTRACT

*This Article discusses Professor Nate Oman's excellent new book, The Dignity of Commerce, which makes an impressive case for how markets can produce "desirable" outcomes for society. In addition to a comprehensive account of what he calls "virtues" of markets, such as their tendency to produce cooperation, trust, and wealth, the book is full of useful and persuasive supporting information and discussions.*

*Oman is not only a fan of markets, but he asserts that markets are the "center" of contract theory, and provide its normative foundation. Elaborating, Oman concludes that "contract law exists primarily to support markets" and that "contracts are valuable because they facilitate commerce and extend the reach of markets. It is their beneficial consequences that justify the enforcement of contracts."*

*This Article focuses on two of the many important issues generated by Oman's thesis. First, has Oman done enough to convince that markets are what he calls the "centerpiece" of contract law? Second, does his effort to present what is essentially a unitary normative theory of contract handcuff his analysis of particular contract issues and doctrines? I will argue that markets are important and contract law should and does play an important role in supporting markets. However, we should not demote other visions of contract law, but see them all as important ingredients in understanding the subject. By largely espousing a unitary, integrative theory of contract law, Oman's thesis leads to a few debatable propositions, including with respect to consent to boilerplate and reliance on promises, which the Article takes up in some detail.*

*The Article concludes that The Dignity of Commerce makes a solid case for the importance and virtues of markets and is rich in*

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*discussion and detail. As with any excellent work, it makes the reader ponder accepted wisdom and adds to the reader's perspective. Further, in making his case for markets, Oman does an excellent job of introducing, discussing, and debunking many counterarguments. My effort in this Article is only to reflect on whether the market argument can capture the entire contract law field.*

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## INTRODUCTION

“Contract law is multidimensional.”<sup>1</sup> By this, I mean that no unitary theory can fully explain contract law. Instead, contract law is comprised of many theories, including promise, reliance, consent, formalist, contextual, critical, economic, and relational theories.<sup>2</sup> I believe we should be wary of unified theories that purport to account for the entire subject, despite the false appeal of theory to clarify and tame a subject. Instead, in my view, the only persuasive theory is that “contract law is a plausible, if not perfect, reflection of various normative choices of the surrounding society.”<sup>3</sup>

Nathan Oman’s excellent new book, *The Dignity of Commerce*, makes an impressive case for how markets can produce “desirable” outcomes for society.<sup>4</sup> In addition to a comprehensive account of what he calls “virtues” of markets, such as their tendency to produce cooperation, trust, and wealth, the book is full of useful and persuasive supporting information and discussions.<sup>5</sup> Oman is indeed an erudite analyst and, in the process of making his case for markets, the book is rich in additional references.<sup>6</sup> Further, Oman is not reluctant to challenge analysts with different perspectives than his own, while at the same time shedding light on their theses.<sup>7</sup>

<sup>1</sup> ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 268 (1997).

<sup>2</sup> *See id.* at 12–18 (promise theory); *id.* at 24–26 (reliance theory); *id.* at 35–36 (consent theory); *id.* at 168 (formalist and contextualist theories); *id.* at 173 (critical theory); *id.* at 213 (economic theories); *id.* at 256 (relational theory).

<sup>3</sup> *Id.* at 274. Of course, I am not alone in holding a pragmatic view of the law. *See, e.g.*, Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 968 (2017) (book review) (“The problem is that Ripstein thinks there’s something lurking beneath the surface that explains all of tort .... But ... Ripstein’s story is too simple to make sense of the doctrine.”).

<sup>4</sup> *See generally* NATHAN B. OMAN, *THE DIGNITY OF COMMERCE* (2017) [hereinafter *DIGNITY*].

<sup>5</sup> I found especially helpful the book’s comparison of consent in democratic institutions and in the context of boilerplate contracts. *Id.* at 141–46.

<sup>6</sup> For example, Oman invokes, among others, *The Merchant of Venice*, *id.* at 1–8; English legal history, *id.* at 5–6; Spartacus, *id.* at 36; *The Iliad*, *id.* at 37; Hayek, *id.* at 38; Aristotle, *id.* at 40–41; Adam Smith, *id.* at 43; Montesquieu, *id.*; Dworkin, *id.* at 51; Rawls, *id.*; and even Gordon Gecko (from the movie “Wall Street”), *id.* at 42.

<sup>7</sup> *See, e.g.*, discussions of the works of Kennedy, *id.* at 33–34; Sunstein, *id.* at 34–35; Dworkin, *id.* at 62–63; Fried, *id.* at 76–77; Radin, *id.* at 138–39; Rakoff, *id.* at 155 n.99; Barnett, *id.* at 155–56; and Leff, *id.* at 157.

An additional strength of *The Dignity of Commerce* is that Oman is not a dogmatic advocate of his position. He sensibly recognizes the darker side of markets: “[O]ne cannot deny that markets can lead to morally monstrous results.”<sup>8</sup> Oman insists that his claim is “modest” that “certain kinds of well-functioning markets are sufficiently desirable to be a fit object of the law’s concern”<sup>9</sup> and that “markets can sometimes be bad.”<sup>10</sup> In a chapter on boilerplate largely advocating a diminished role for the principle of consent, he admits that “consent is not irrelevant[.]”<sup>11</sup> and usefully discusses its various contributions.<sup>12</sup>

Still, Oman writes that markets are the key to an integrated solution to some of the great contract law issues and he goes pretty far in placing markets as the core and foundation of contract law at the expense of other theories.<sup>13</sup> In testing his theory, I will focus on the role of consent in boilerplate cases and the function of reliance in the enforcement of promises to show that in my view much more is at work than Oman’s “market argument.”<sup>14</sup> First, in

<sup>8</sup> DIGNITY, *supra* note 4, at 18.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.* at 156.

<sup>12</sup> *See, e.g., id.* at 145–47.

<sup>13</sup> Commerce, according to Oman, “rightly constitutes the core of contractual liability.” *Id.* at 110. Further, he writes that “contract law exists to support markets.” *Id.* at 166. Oman’s thesis is somewhat surprising in that previously he did not seem to be a great fan of unitary theories of contract or at least recognized the complexity of the field. In reviewing Stephen Smith’s *Contract Theory*, Oman writes, “[C]ompeting disciplinary approaches have been energetically proselytizing for their chosen theories. Hence, modern legal scholarship abounds with economic, philosophical, and sociological theories of contract law.” Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1483 (2005) (reviewing STEPHEN A. SMITH, *CONTRACT THEORY* (2004)). Further, “in [Smith’s] drive to ground contract law in a single normative principle, he comes to the startling conclusion that many of what we think of as the core rules of the subject—such as those governing breach and damages—are not actually part of contract law at all.” *Id.* at 1485. Ultimately, however, Oman’s resolution of the debate between pragmatists and unitary theorists is to argue that “theorists should turn their attention toward providing a principled way of integrating competing approaches to contract in a single theory,” notwithstanding his admonition to abandon “trying to unite all of contract law under a single normative principle.” *Id.* It seems Oman wants to end up with a “single theory,” albeit one that “integrates” the multiple dimensions of contract law. *Id.* at 1485, 1506.

<sup>14</sup> Oman uses this phrase throughout the book. DIGNITY, *supra* note 4, at 15–17, 125, 181.

Part I, I will briefly describe Oman's thesis and raise some concerns. Then I will discuss two issues in Part II. First, has Oman done enough to convince that markets are what he calls the "centerpiece" of contract law? Second, does his effort to present what is essentially a unitary, integrative theory of contract handcuff his analysis of particular contract issues and doctrines? I will argue that markets are important and contract law should and does play an important role in supporting markets. However, we should not demote other visions of contract law, but see them all as important ingredients in understanding the subject. By largely espousing a unitary, integrative theory of contract law,<sup>15</sup> Oman boxes himself into a corner that leads to some debatable propositions, including with respect to consent to boilerplate and reliance on promises.

### I. THE THESIS OF *THE DIGNITY OF COMMERCE*

Oman comes right to the point on the first page of *The Dignity of Commerce*: "[W]ell-functioning markets are morally desirable," so contract law *should* support them.<sup>16</sup> In filling out his vision, he urges that markets are a "social practice [that] produce[s] certain outcomes that we should regard as morally desirable."<sup>17</sup> Not only do markets increase wealth, but they also engender "peaceful cooperation in a pluralistic society and inculcate certain moral virtues in market participants,"<sup>18</sup> including cooperation and trust.<sup>19</sup> Thus, markets "flatten social hierarchies"<sup>20</sup> because "[l]iberal politics alone cannot provide a sufficient framework of cooperation for a society with deep moral disagreements."<sup>21</sup> Further, Oman seeks to refute those pessimistic about the influence of markets, such as those who fear that commodification and adhesion are the end-result of markets.<sup>22</sup>

Partly in response to the latter concern, Oman isolates the conditions necessary for markets to succeed, including that they

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<sup>15</sup> See *supra* note 13 and accompanying text.

<sup>16</sup> DIGNITY, *supra* note 4, at 1.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.* at 101.

<sup>20</sup> *Id.* at 46.

<sup>21</sup> *Id.* at 54.

<sup>22</sup> *Id.* at 170–75.

must be “well-functioning”<sup>23</sup> and not “pernicious.”<sup>24</sup> However, these terms challenge definition. For example, for Oman, well-functioning markets “are defined by conditions necessary to deliver a particular set of moral goods: cooperation, certain virtues, and wealth.”<sup>25</sup> Pernicious markets, on the other hand, harm their participants, or “involve the injection of mercantile values in contexts and practices where those values are destructive,” or involve a trade of goods or action “whose character is changed ... resulting in a loss of ... value.”<sup>26</sup> Oman follows with some examples, but faces a challenge in defining boundaries between markets that are harmful or destructive and those that deliver the moral goods. Without a more systematic strategy for comparing the benefits of and harm caused by a given market, how is the reader to be convinced that markets are not “morally unresolvable”<sup>27</sup> and that the net result of a given market is beneficial to society?<sup>28</sup>

Oman is not only a fan of markets, but he asserts that markets are the “center” of contract theory,<sup>29</sup> and provide its normative foundation.<sup>30</sup> Elaborating, Oman concludes that “contract law exists primarily to support markets”<sup>31</sup> and that “contracts are valuable because they facilitate commerce and extend the reach of markets. It is their beneficial consequences that justify the enforcement of contracts.”<sup>32</sup> With this framework, Oman seeks to resolve some controversial contract law issues.<sup>33</sup> Among these, Oman writes that

<sup>23</sup> *Id.* at 63.

<sup>24</sup> *Id.* at 160.

<sup>25</sup> *Id.* at 162.

<sup>26</sup> *Id.* at 166–67.

<sup>27</sup> Robert D. Kaplan, *Why Trump Can't Disengage From the World*, N.Y. TIMES, Jan. 6, 2017, <https://www.nytimes.com/2017/01/06/opinion/sunday/why-trump-cant-disengage-america-from-the-world.html>.

<sup>28</sup> Of course, this problem is not unique to Oman's market argument. Consider the principle of manifest destiny. By the United States' allegiance to the principle, the country gained vast resources necessary to defeat our Axis foes in World War II. *Id.* On the other hand, “because settling that continent involved slavery and genocide against the indigenous inhabitants, American history is morally unresolvable.” *Id.*

<sup>29</sup> DIGNITY, *supra* note 4, at 13.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 38; *see also id.* at 90.

<sup>32</sup> *Id.* at 143.

<sup>33</sup> *See infra* Part II.

contract law should enforce contracts of adhesion,<sup>34</sup> that “consent does not justify the enforcement of [boilerplate] contracts,”<sup>35</sup> and that reliance on promises plays no role in their enforcement.<sup>36</sup> Part II of this Essay focuses on Oman’s take on these issues.

## II. OMAN’S RECIPE FOR CONTRACT LAW, WITH A SPECIAL FOCUS ON CONSENT TO BOILERPLATE AND RELIANCE ON PROMISES

Part II of *The Dignity of Commerce* describes the “basic structure for a market-sustaining law of contracts.”<sup>37</sup> Oman’s market orientation leads to some conclusions about contract law that will be controversial to some readers. I focus on consent to boilerplate and reliance on promises.

### A. *Consent to Boilerplate*

Oman makes an excellent argument in favor of the importance of consent. For example, he posits that a consent requirement serves a coordination function, ensuring that the parties agree to the same terms, but at the same time allowing “transactional flexibility and experimentation.”<sup>38</sup> Consent also curbs abuse by providing a constraint on the drafter.<sup>39</sup>

Nevertheless, Oman asserts that the focus on consent in boilerplate cases is “attenuated” and “misplaced.”<sup>40</sup> Contract law enforces boilerplate because “doing so strengthens and extends markets.”<sup>41</sup> Further, in boilerplate circumstances, “the moral value of markets and commerce ... justifies contractual enforcement.”<sup>42</sup> Oman demotes consent to serving “subordinate functions” only.<sup>43</sup> In fact, according to Oman, boilerplate requires only a “bare minimum of

<sup>34</sup> DIGNITY, *supra* note 4, at 17.

<sup>35</sup> *Id.* at 134.

<sup>36</sup> *Id.* at 107.

<sup>37</sup> *Id.* at 39.

<sup>38</sup> *Id.* at 142; *see also id.* at 145 (“stating we give effect only to terms agreed to by both parties.”).

<sup>39</sup> *Id.* at 146.

<sup>40</sup> *Id.* at 134.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

consent”<sup>44</sup> and “need not be particularly well informed,”<sup>45</sup> so the “search for meaningful consent should be abandoned.”<sup>46</sup> Instead, Oman relies on “the social context on which boilerplate is written” to find what he calls “feedback mechanisms” that limit the possibility of abuse,<sup>47</sup> such as competition and reputational sanctions.<sup>48</sup>

To reach these conclusions, Oman relies in part on economic theory, reinforced by an anecdote about his positive experience with his Kindle.<sup>49</sup> As to the former, certainly non-legal forces, such as price competition and reputation, mitigate what he calls “the parade of horrors” that surface too often in the writings of market critics.<sup>50</sup> As to the latter, many of us can also share stories about good experiences with vendors and manufacturers. Although critics of markets may overstate their case, unfortunately there is also plenty of evidence of overreaching to suggest caution about whether market forces should allay concerns about boilerplate.<sup>51</sup> Take, for example, the profusion of “dangerous” terms in software end-user license agreements.<sup>52</sup> Terms that allow software vendors to invade our privacy, that authorize automatic renewal and unilateral modification, that call for arbitration in distant venues and deny class actions, or that disclaim all liability notwithstanding representations on vendors’ websites that would constitute express warranties, are just a few reasons for concern.<sup>53</sup> So I am

<sup>44</sup> *Id.* at 135; *see also id.* at 153.

<sup>45</sup> *Id.* at 156.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 148.

<sup>48</sup> *Id.* at 150–53.

<sup>49</sup> *Id.* at 141–53.

<sup>50</sup> *Id.* at 141; *see id.* at 151–53 (discussing non-legal forces). Oman asserts that “[i]n a competitive market, economic theory suggests that prices will be driven down to marginal cost. If boilerplate reduces costs to firms, any resulting rents should ultimately be dissipated as price reductions to consumers.” *Id.* at 151. But he admits there is little empirical evidence to substantiate this claim. *Id.*

<sup>51</sup> *See, e.g.,* Robert A. Hillman & Ibrahim Barakat, *Warranties and Disclaimers in the Electronic Age*, 11 *YALE J.L. & TECH.* 1, 6–7, 9–10, 15–16 (2009) (noting that vendors disclaim liability in their end-user license agreements after making express warranties on their websites).

<sup>52</sup> *See* Annalee Newitz, *Dangerous Terms: A User’s Guide to EULAs*, *ELEC. FRONTIER FOUND.* (Feb. 2005), <http://www.eff.org/wp/dangerous-terms-users-guide-eulas> [<https://perma.cc/FU9E-Y374>].

<sup>53</sup> *See id.*; *DIGNITY*, *supra* note 4, at 134.

not persuaded by Oman's argument that contract law should take a "permissive stance toward the enforcement of boilerplate."<sup>54</sup>

Notwithstanding my concern, Oman's perspective on consent seems closest to Llewellyn's "blanket assent" theory of boilerplate,<sup>55</sup> in which consumers understand that they will be bound to reasonable terms they do not bother to read,<sup>56</sup> for which I have a lot of sympathy.<sup>57</sup> But blanket assent requires a reasonable presentation of non-egregious terms.<sup>58</sup> And blanket assent probably comes closest to the reality of what people are thinking when they sign or click "I agree" to boilerplate.<sup>59</sup> So I would argue that Llewellyn's conception of consent is more than a "bare minimum of consent."<sup>60</sup>

Oman worries that the focus on the threshold of "meaningfulness of consent," such as my observation about blanket assent, creates ambiguity and is ultimately unhelpful.<sup>61</sup> But any assessment of whether "feedback mechanisms"<sup>62</sup> are working successfully, and whether a market is "well-functioning," are also problematic.<sup>63</sup> Consider again the Internet software market's profusion of "dangerous terms."<sup>64</sup> Oman relies in part on whether such a market causes "harm,"<sup>65</sup> but he admits that he has no "particular theory of harm to offer."<sup>66</sup>

<sup>54</sup> DIGNITY, *supra* note 4, at 158.

<sup>55</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) (asserting that there is no "specific assent" to boilerplate clauses, but rather the consumer assents generally to "any not unreasonable or indecent terms ... which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms" that make up the dominant agreement.).

<sup>56</sup> See LLEWELLYN, *supra* note 55, at 370–71.

<sup>57</sup> See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 461–63 (2002).

<sup>58</sup> See *id.*

<sup>59</sup> Arthur Leff made a similar argument years ago. See Arthur Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 152–53 (1970).

<sup>60</sup> DIGNITY, *supra* note 4, at 135.

<sup>61</sup> *Id.* at 156–58.

<sup>62</sup> *Id.* at 148.

<sup>63</sup> See *id.* at 19, 135; *supra* text accompanying notes 23–27 (asserting that lack of a systematic strategy to compare a market's benefits to its harms can create the view that markets are "morally unresolvable").

<sup>64</sup> Newitz, *supra* note 52.

<sup>65</sup> DIGNITY, *supra* note 4, at 166–67.

<sup>66</sup> *Id.* at 167.

Oman concludes the boilerplate discussion by noting that his market argument is not primarily about autonomy, and therefore the argument “provides no principled objection per se to regulating contracts based on their content.”<sup>67</sup> I agree that enforcement of boilerplate may ultimately come down to policing the substance of terms. For me, this only introduces more theories, principles, and values into the mix of boilerplate enforcement, such as fairness, corrective justice, and morality. Ultimately, then, I am not sure why the market argument trumps consent, or for that matter, other principles. Why the need to find a key element?

### *B. Reliance on Promises*

Oman presents what he believes the law of promise enforcement should be in order to facilitate markets. He writes that “all promises made in furtherance of commercial activity within a market should be presumptively enforceable, regardless of whether” the promise is supported by consideration or relied on, and promises outside of markets that are part of a bargain should also be enforced.<sup>68</sup> To support this perspective, Oman in part must convince the reader that reliance on promises is not important, notwithstanding that reliance is a key element of promissory estoppel as pronounced in the Restatement (Second) of Contracts, as well as in a multitude of cases.<sup>69</sup>

Prior to the mid-1980s, courts and analysts assumed that reliance was the core of promissory estoppel.<sup>70</sup> But an article by Farber and Matheson upset the applecart.<sup>71</sup> The article concluded that “reliance is no longer the key to promissory estoppel.”<sup>72</sup> The authors asserted that courts enforce promises if the promisor made a “credible” promise, and the promisor would benefit “from economic

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<sup>67</sup> *Id.* at 158–59.

<sup>68</sup> *Id.* at 90; *see id.* at 100.

<sup>69</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1979).

<sup>70</sup> *See, e.g.*, Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 909–10 (1985).

<sup>71</sup> *See id.* at 903–04.

<sup>72</sup> *Id.* at 904. Oman refers to “a number of extensive studies” that claim that courts enforce promises in commercial settings without reliance. *See* DIGNITY, *supra* note 4, at 106 (citing Farber & Matheson, *supra* note 70, at 907 n.16; Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation,* 15 HOFSTRA L. REV. 443, 455–68 (1987)).

activity.”<sup>73</sup> Reliance might be invoked in the cases, Farber and Matheson believed, but courts paid only lip service to it in their decisions.<sup>74</sup> Analysts began treating Farber and Matheson’s work as a “new consensus” that plaintiffs can succeed in promissory estoppel cases without demonstrating their reliance on a promise.<sup>75</sup>

Apparently influenced by this work, Oman writes that “courts are finding promissory estoppel in the absence of clear evidence of reliance provided that the promises occur in a commercial context where we can infer that the parties intended to be legally bound.”<sup>76</sup> Oman, therefore, concludes that “reliance does no work in picking out which promises should be enforced.”<sup>77</sup> This conclusion reinforces Oman’s thesis that the benefits of commercial activity in markets is the reason that the law enforces promises, not reliance.<sup>78</sup>

But, as a descriptive matter, are Farber and Matheson, and now Oman, correct that reliance is unimportant in promissory estoppel cases? There is considerable contrary evidence. For example, my study of all promissory estoppel cases from 1994 through 1996 concluded that reliance was a necessary requisite to recovery.<sup>79</sup> In 93 percent of the cases that were successful on the merits, courts not only discussed the reliance element but, “specifically looked for and found reliance in ... the case.”<sup>80</sup> I wrote:

Not only did the courts look for reliance in successful cases, the reliance they found was concrete and real. Typical cases included a general contractor making a bid for a renovation job in reliance on a subcontractor’s bid to install the roof, a company spending more than \$75,000 to erect a sign in reliance on a state’s approval of the location, and a stockbroker purchasing bonds for resale in reliance on an investor’s promise to buy the bonds.<sup>81</sup>

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<sup>73</sup> See Farber & Matheson, *supra* note 70, at 914. See also Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 133 (1991).

<sup>74</sup> See Farber & Matheson, *supra* note 70, at 904.

<sup>75</sup> See, e.g., Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 522 (1996); James Gordley, *Enforcing Promises*, 83 CALIF. L. REV. 547, 569 (1995).

<sup>76</sup> DIGNITY, *supra* note 4, at 106.

<sup>77</sup> *Id.* at 107.

<sup>78</sup> According to Oman, reliance “is not a theory of contract at all.” *Id.*

<sup>79</sup> See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 600–01 (1998).

<sup>80</sup> *Id.* at 597.

<sup>81</sup> *Id.* at 603 (discussing *Branco Enters. v. Delta Roofing*, 886 S.W.2d 157, 158 (Mo. Ct. App. 1994); *Dean Witter Reynolds, Inc. v. Cont’l Cas. Co.*, 897 F.

Further, reliance was a focus “across variations in subject matter, the size and nature of the litigants, and the court rendering the judgment.”<sup>82</sup> Finally, I found that “[t]he promise theorists’ assertion of the relative unimportance of reliance seemed much less persuasive after reviewing the cases and arguments used to support it.”<sup>83</sup>

A much less systematic effort to look at some recent promissory estoppel cases suggests that reliance still plays a crucial role in the cases.<sup>84</sup> Typical language in the opinions reinforces this claim: “Detrimental reliance is an indispensable element of a promissory estoppel claim ... and a failure to adequately plead that element requires dismissal.”<sup>85</sup> “The vital principle is that who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.”<sup>86</sup>

A typical successful case on the pleadings, is *irth Solutions, LLC v. Windstream Communications, LLC*, where plaintiff, a software provider, continued to provide services to defendant subscriber after its subscription ended.<sup>87</sup> At the time, the defendant owed over

Supp. 142, 143 (S.D.N.Y. 1995); and *Pilot Oil Corp. v. Ohio Dep’t of Transp.*, 656 N.E.2d 1379, 1382–83 (Ohio Ct. App. 1995)).

<sup>82</sup> *Id.* at 583.

<sup>83</sup> *Id.* at 618.

<sup>84</sup> I asked a research assistant to enter “promissory estoppel” as the search term on Westlaw and to report on sixty or so of the most recent cases. My assistant recorded (1) the name of the case and citation; (2) the holding; (3) whether the decision was based on a motion (e.g., summary judgment or on the pleadings) or on the merits after trial; (4) the reason for the decision (focusing on the promissory estoppel cause of action); (5) where applicable, whether the court granted reliance or expectancy damages; and paramount for purposes here; (6) what the court has to say about reliance as an important factor. I then looked at the first sixty or so cases that popped up. I focus on issue (6) here.

<sup>85</sup> *Schroeder v. Pinterest, Inc.*, 17 N.Y.S.3d 678, 694 (N.Y. App. Div. 2015) (“The complaint merely states, in conclusory fashion, that plaintiffs ‘reasonably relied on Cohen’s promise,’ but does not explain how they purportedly relied. Indeed, there are no facts pleaded showing that plaintiffs did something, or refrained from doing something, in reliance on Cohen’s email.”).

<sup>86</sup> *Faulks v. Wells Fargo & Co.*, 231 F. Supp. 3d 387, 404 (N.D. Cal. 2017) (quoting *Garcia v. World Sav., FSB*, 183 Cal. App. 4th 1031, 1041–43 (2010)). And further, “logically, injury is required; without injury there would be no injustice in not enforcing the promise.” *Oliveira v. Sugarman*, 152 A.3d 728, 746 (Md. 2017) (quoting JOSEPH M. PERILLO, *CONTRACTS* § 6.1 (7th ed. 2014)).

<sup>87</sup> *irth Sols., LLC v. Windstream Commc’ns, LLC*, No. 2:16-cv-219, 2017 WL 367146, at \*1 (S.D. Ohio Jan. 25, 2017). Courts decide many of such cases at the pleading stage.

\$97,000 on the subscription.<sup>88</sup> While the parties were negotiating a new deal, defendant promised to pay for additional services.<sup>89</sup> The court stated:

The complaint ... makes sufficient factual allegations to support the plausibility of plaintiff's reliance being reasonable. Defendant had been a client of plaintiff's since 2007. Wanting to retain its client's business and to recover as much of the past due overages as readily as it could, plaintiff made the good faith gesture of continuing to provide service to defendant on defendant's promise that it would pay for the continuation of service. Plaintiff did so for one month, a period of time that the court views, again at the pleading stage, as reasonable in light of the allegations that the parties were attempting to negotiate a new deal during that period. Accordingly, defendant's motion to dismiss the promissory estoppel claim is denied.<sup>90</sup>

In cases where the plaintiff did not succeed, either on the merits or on the pleadings, the lack of reasonable reliance was at least one of the reasons—except where the court did not find an actionable promise, which, of course, short-circuits the need for a discussion of reliance<sup>91</sup>—or where the court found that the actionable

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<sup>88</sup> *Id.* at \*3.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also *State ex rel. Kingry v. Landmarc Cap. & Inv. Co.*, No. 1 CA-CV 14-0022, 2016 WL 7477720, at \*3 (Ariz. Ct. App. Dec. 29, 2016) (discussing whether reliance was reasonable); *Boswell v. City of Chi.*, 69 N.E.3d 379, 385 (Ill. App. Ct. 2016) (noting that plaintiff reasonably relied on city's promise of employment by leaving his previous employment and moving with his family to Chicago); *Salatino v. Salatino*, 786 N.Y.S.2d 570, 571 (N.Y. App. Div. 2004) (noting that plaintiff's father promised to convey certain interests in real property to his daughter; complaint sufficient because of the allegation that the plaintiff "invested time and money managing and maintaining both properties."); *Guidry v. Wells Fargo Bank, N.A.*, No. H-16-2618, 2017 WL 58845, at \*3 (S.D. Tex. Jan. 4, 2017) ("[d]efendant does not cite any authority for the proposition that foregoing action to prevent foreclosure is not sufficient for detrimental reliance.").

<sup>91</sup> See, e.g., *Class Racing Stable, LLC v. Breeders' Cup Ltd.*, No. 5:16-200-KKC, 2017 WL 562175, at \*2 (E.D. Ky. Feb. 10, 2017) (holding reliance was not reasonable); see also *Condor Funding, LLC v. 176 Broadway Owners Corp.*, 46 N.Y.S.3d 99, 101 (N.Y. App. Div. 2017) ("defendant did not establish that plaintiff clearly and unambiguously promised to terminate the agreement."); *Bolender v. Ronin Prop. Partners, LLC*, 49 Misc.3d 1218(A), at \*15 (N.Y. Sup. Ct. 2015) (holding that promissory estoppel did not apply because the promise was not "clear and unequivocal"); *Hester v. Case W. Res. Univ.*, 80 N.E.3d 1186, 1199 (Ohio Ct. App. 2017) (finding that the university did not promise plaintiff to reserve her previous job for her).

contract claim displaced the promissory estoppel claim.<sup>92</sup> A typical unsuccessful case was *Ferreyr v. Soros*, where plaintiff's claim that defendant promised to purchase a condominium failed on the pleadings because the alleged facts did not demonstrate an "unconscionable injury" to the plaintiff in reliance on defendant's promise.<sup>93</sup>

As with Oman's discussion of boilerplate consent, I think his focus on markets leads to a conclusion he need not reach. Instead of asserting that the market theory displaces reliance, why not conclude that markets and reliance share the load in promissory law, along with still other elements?

### CONCLUSION

I loved reading *The Dignity of Commerce*. It makes a solid case for the importance and virtues of markets and is rich in discussion and detail. As with any excellent book, it makes the reader ponder accepted wisdom and adds to the reader's perspective. Further, in making his case for markets, Oman does an excellent job of introducing, discussing, and debunking many counterarguments. My effort here is only to reflect on whether the market argument really can capture the entire contract law field.

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<sup>92</sup> See, e.g., *JJM Sunrise Auto., LLC v. Volkswagen Grp. of Am., Inc.*, 997 N.Y.S.2d 270, 291 (N.Y. Sup. Ct. Dec. 1, 2015); see also *Inspired Dev. Grp., LLC v. Inspired Prod. Grp., LLC*, No. 9:16-CV-80076-ROSENBERG/BRANNON, 2017 WL 411997, at \*9 (S.D. Fla. Jan. 31, 2017); *Lawson v. Ass'n of Apartment Owners*, No. 15-00449 DKW-KSC, 2016 WL 749361, \*9–10 (D. Haw. Dec. 30, 2016) (holding that a valid contract claim displaces promissory estoppel).

<sup>93</sup> *Ferreyr v. Soros*, 984 N.Y.S.2d 296, 297 (N.Y. App. Div. 2014); see also *Landan v. Wal-Mart Real Estate Bus. Trust*, 2016 WL 5253329 (W.D. Pa. 2016) (landowner's reliance on alleged promises of prospective lessee to sign a lease was unreasonable in light of the express language of the letter of intent).