Panel III

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Panel III, 77 Cornell L. Rev. 1021 (1992)
Available at: http://scholarship.law.cornell.edu/clr/vol77/iss5/16
INTRODUCTION

The subject for discussion is individual responsibility in the context of tort law and contract law. However one feels about it, and I assume there is considerable diversity of opinion among the panelists, it seems beyond dispute that the law has changed radically in the past couple of decades. These changes often relieve persons of obligations they have undertaken. Such changes do not occur in isolation; changes in judge-made law may reflect strong currents in the culture. Law reflects those changes and tends to reinforce them. There will, of course, be resistance to change and when that resistance occurs, we are entitled to call the conflict a cultural war.

It is not clear to me how to describe in a single phrase what is happening in our legal culture. One thing we are seeing is, as Peter Huber put it in his book, a move from individual responsibility to collective responsibility. Nowhere is this more true than in tort law, and the movement away from individual responsibility may be very strong in constitutional law as well.
SOME PROBLEMS WITH CONTRACT AS PROMISE

Randy E. Barnett†

INTRODUCTION

Contract as Promise

Despite the fond hopes of generations of legal scholars and activists, freely negotiated and enforceable contracts still govern the bulk of commercial relations in this country—particularly large complex commercial relations as opposed to consumer transactions. Law professors have to search pretty hard to find appellate cases that can be touted as harbingers of a contract-free future.

I want to begin this presentation by acknowledging the important role that Allan Farnsworth has played in keeping contract alive. Professor Farnsworth is without doubt the preeminent living American contracts authority. His principal contributions include the Restatement (Second) of Contracts ("Second Restatement"), for which he was the reporter, and his masterful treatise on contracts. These two projects testify to the fact that one person can make a difference in the development of law; they have been the doctrinal glue holding the rules and principles of modern contract law together against a siege of anti-contract ideology coming from academia. Additionally, I would be unfair to Allan were I to neglect his theoretically insightful law review articles, particularly those concerning contractual interpretation.

If the goal of this symposium was to hear from two contract law professors with diametrically opposing views, then I am afraid that the organizers erred in inviting Professor Farnsworth and myself. This is not to say, however, that I have no disagreements with Professor Farnsworth. I do. In this essay, I shall try to explain why, although contract thankfully still lives in practice, the prevailing theory of contract that has been promoted by Professor Farnsworth and others is deficient in that it leaves contract law vulnerable to

† Norman and Edna Frechling Scholar and Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law.

1 Restatement (Second) of Contracts (1981).
2 See E. Allan Farnsworth, Farnsworth on Contracts (1990).
being undermined in the ways that, for example, Walter Olson describes in his contribution to this symposium.4

In particular, mainstream contract theory is dominated by the conception of “contract as promise,” or what I shall call the promise theory of contracts. From the Second Restatement to Contract as Promise5 by Charles Fried, it is widely assumed that the basis of enforcing contracts is related to the obligation one has to keep one’s promises.6 According to this theory, one looks to the institution of promising to see why, and therefore when, commitments should be legally enforceable. This is hardly a new development. The promise theory of contract achieved preeminence through the efforts of Harvard Law School Professor Samuel Williston in his famous treatise7 and in the first Restatement of Contracts (“First Restatement”).8 (You might say that Professor Williston was the Allan Farnsworth of his day.)

Now I realize that to many the promise theory may seem not only to be obviously correct, but one cannot immediately imagine an acceptable alternative to it. Certainly, it seems preferable to the detrimental reliance theory of contract promoted by those heralding the “Death of Contract.”9 And I freely admit that the promise theory has its attractions—particularly if one assesses, as I do, the vitality of contract by the extent to which a legal system implements the classical liberal conception of justice,10 a central principle of which is freedom of contract. Freedom of contract has two distinct dimensions: The first—freedom from contract—stipulates that persons should not have contractual obligations imposed on them without their consent. The second—freedom to contract—stipulates that

6 This does not mean that a promise theory is necessarily a “will theory” which bases contractual obligation on the promisor’s subjective will to be bound. Promises may also be thought to create obligation because other persons have or are likely to rely upon them to their detriment. For a discussion of the various theories that have been advanced to justify contractual obligation, see Randy E. Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 271-91 (1986) (critically evaluating will, reliance, efficiency, fairness, and bargain theories of contractual obligation).
8 8 RESTATEMENT OF CONTRACTS (1928). Williston was the Reporter for the First Restatement.
persons should have the power to alter by consent their legal relations.\textsuperscript{11} The promise theory has been salutary to both aspects of freedom of contract to some degree.

The promise theory views the origin of contract in the making of a promise.\textsuperscript{12} This means that it views the creation of contracts as arising, in an important part, from the voluntary acts of promisors rather than from third parties like the State. In this regard, the theory facilitates the classical liberal value of freedom to contract. The promise theory also supports the notion that contracts should be interpreted according to the terms of the promise rather than by imposing terms on the parties. In this regard, the theory facilitates the classical liberal value of freedom from contract. These strengths of the promise theory are why I credit Professor Farnsworth—one of the leading proponents of this theory of contract—with helping to keep contract alive. By promoting the promise theory so effectively, he has helped bolster both freedom from and freedom to contract.

Yet the promise theory is not without its difficulties, though these difficulties are complex and hard to explain concisely. With this caveat in mind, however, and at the risk of substantial oversimplification, I shall attempt to summarize some of the problems that arise from adhering to a promise theory of contract.

\section*{I

\textbf{SOME PROBLEMS WITH THE PROMISE THEORY OF CONTRACT}}

Serious problems with the promise theory begin the moment we seek a rationale for enforcing promises. The problem for which the promise theory is supposed to be the solution is to figure out exactly why it is that contracts are legally enforceable (and, therefore, which commitments should be enforced). That is, we are concerned, not with why persons ought to keep their word, but with why and therefore when coercion may be used by third parties, including the State, to compel promisors either to perform or pay damages when they fail to keep their word. The best-known answers to the question of legal enforceability provided by the promise theory are often either highly moralistic or tort-like in nature.

\footnote{\textsuperscript{11} For a discussion of these principles and the important social functions they perform, see Randy E. Barnett, \textit{The Sound of Silence: Default Rules and Contractual Consent}, 78 \textit{Va. L. Rev.} 821 (1992).}

\footnote{\textsuperscript{12} \textit{See Restatement (Second) of Contracts} § 1 (1981) ("A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."); \textit{Farnsworth}, \textit{supra} note 2, § 11, at 4 ("[T]he law of contracts is confined to promises.") (emphasis added).}
Professor Fried, for example, has argued that the obligation to keep one's promises is a moral one:

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. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.13

But a moral theory of promising, standing alone, would have courts enforcing purely moral commitments, which is tantamount to legislating virtue. Such an open-ended rationale leads to serious problems for the value of freedom of contract. First, it commits courts to enforcing promissory commitments that the parties themselves may never have contemplated as "contractual" or legally enforceable, thereby undermining the value of freedom from contract. Second, once the moral behavior of the promissor is deemed relevant to the issue of enforceability, the promise theory also appears to make relevant to the issue of enforcement other moral aspects of the promisor's behavior that may argue against enforcement, thereby undermining the value of freedom to contract. In this manner, the common-law rights of contract can come to resemble the judicial discretion of a court of equity.

Another popular justification of the promise theory looks at the promise from the direction of the promisee. That is, persons may be compelled to perform or pay damages because others have relied or are likely to rely upon a promise to their detriment.14 This was the rationale for contract law apparently favored by Fuller and Perdue in their famous article The Reliance Interest in Contract Damages15—although, as evidenced by his later article, Consideration and Form,16 Lon Fuller himself never took an injurious reliance theory as far as the many subsequent law professors who so admire his earlier path-breaking work. When the enforceability of promises is justified in this way the promise theory is but a short step away from a detrimental reliance theory. That is, once the injury suffered by the promisee is made the principal rationale for enforcing promises, we

13 FRIED, supra note 5, at 16 (footnote omitted).
16 Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799 (1941). In this article, Fuller makes clear that he considers private autonomy to be a vital part of any complete account of contractual obligation.
end up with the following very tort-like theory of contract: Just as tort actions compensate persons injured by physical conduct, contract actions compensate persons injured by verbal promissory conduct. In such an approach, either dimension of freedom of contract plays little, if any, role. In sum, this way of justifying the promise theory ultimately transforms it into the detrimental reliance theory, which undermines rather than supports contract as a distinct type of consensual obligation within the liberal conception of justice.

Even the efficiency rationale for the promise theory provided by law-and-economics scholars creates problems. According to this view, an exchange of promises (bargains) is enforceable because both parties are made better off ex ante.\textsuperscript{17} Sole reliance on this rationale creates two problems. First, it apparently permits promises to go unenforced whenever it can be shown that factors such as unequal bargaining power or disparities of information undermine the normal assumption of mutual ex ante gain.\textsuperscript{18} Second, it enables some to ask why the efficacy of contracts should be assessed according to the ex ante benefits rather than some assessment of ex post fairness of the exchange. Why is the perspective of the parties before the exchange occurs the most appropriate point in a transaction to assess whether someone is made better or worse off by an exchange?

Yet another serious problem for freedom of contract is created by the promise theory's exclusive focus on promises once it is conceded, as it must be, that many real-world contract law problems arise precisely because parties have unavoidably left "gaps" in their promises. Some theorists argue that other nonpromissory principles must be used to determine the "gap-filling" rules of contract law.\textsuperscript{19} According to Charles Fried, who takes exactly this position, where gaps exist in a contract, "the court is forced to sort out the difficulties that result when parties think they have agreed but actually have not. The one basis on which these cases cannot be resolved is on the basis of the agreement—that is, of contract as promise."\textsuperscript{20} While Fried, perhaps reluctantly, concedes this point, other theorists who are quite hostile to viewing consent as central to

\textsuperscript{17} Of course, the law-and-economics analysis of contract is considerably richer and more complex than this simple proposition. See generally Richard A. Posner, Economic Analysis of Law 79-123 (3d ed. 1986).

\textsuperscript{18} See, e.g., Melvin A. Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 750 (1982) ("The argument based on the efficiency of contract price is fully effective only to the extent that the relevant market does not materially differ from a perfectly competitive market. In fact, however, many contracts are made in markets that are highly imperfect.").

\textsuperscript{19} See Barnett, supra note 11.

\textsuperscript{20} Fried, supra note 5, at 60.
contract law—such as relational theorists Ian Macneil\textsuperscript{21} and Peter Linzer\textsuperscript{22}—exalt in this view.

Perhaps more surprisingly, some law-and-economics scholars have adopted the same argument.\textsuperscript{23} Because the problem of promissory gaps is pervasive, the promise theory implicitly legitimizes a variety of gap-filling rules based not on the parties' explicit or implicit consent, but on any policy or principle a court or legislature may happen to prefer. As Richard Craswell has argued, "[d]ebates over the question of why promises are binding . . . do much less than is commonly supposed to settle the role to be played by efficiency, non-economic values, or ethical theories generally in selecting contract law's background rules."\textsuperscript{24}

II

SOME ADVANTAGES OF A CONSENT THEORY OF CONTRACT

What alternative is there to the promise theory that can capture its advantages while avoiding its drawbacks? I favor an updated version of the older view of contract that seeks to distinguish between enforceable and unenforceable promises by looking to see if the parties to an agreement manifested their intention to create or alter their legal relations. According to this approach, the factor that must accompany a promise and that justifies substantial reliance upon a promise is the existence of a manifested intention to create legal relations or, to use another common formulation, a manifested intention to be legally bound.\textsuperscript{25}

I have called this the consent theory of contract.\textsuperscript{26} According to a consent theory (and here I simplify the theory considerably),

\textsuperscript{21} See, e.g., Ian R. Macneil, Restatement (Second) of Contracts and Presentation, 60 VA. L. REV. 589, 593 (1974) ("When the guise of . . . consensually formed law was not possible, . . . the system filled the gaps by supplying presentation in the form of predictable and theoretically precise rules."). For a more extensive presentation of Macneil's views of consent and my critique, see Randy E. Barnett, Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract, 78 VA. L. REV. (forthcoming August 1992).

\textsuperscript{22} See Peter Linzer, Uncontracts: Context, Contorts and the Relational Approach, 1988 ANN. SURV. AM. L. 139; Peter Linzer, Is Consent the Essence of Contract?—Replying to Four Critics, 1988 ANN. SURV. AM. L. 213.


\textsuperscript{24} Id. at 528. For my reply to Craswell, see Barnett, supra note 11 at 874-97.

\textsuperscript{25} Although these two formulations are adequate for most purposes, for reasons that are beyond the scope of this essay, they are not completely accurate. A more complete expression of the principle would be that contractual obligation arises when a person "voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights." Barnett, supra note 6, at 300.

\textsuperscript{26} In addition to the articles already cited, see Randy E. Barnett, Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud, 15 HARV. J.L. & PUB. POL'Y (forthcoming 1992) Randy E. Barnett, The Internal and External Analysis of Concepts, 11 CARDOZO L. REV. 525 (1990); Randy E. Barnett, Squaring Undis-
promises and other types of commitments ought to be legally enforceable if they are made in such a way as to convey to a promisee the message that the promisor intends to be held legally accountable for nonperformance. This message can be conveyed formally—for example, by a signed waiver of tort liability that is written in a manner that is intelligible to the person signing it.\textsuperscript{27} Or it can be conveyed informally, as done on every commodities exchange in the world.\textsuperscript{28} Regardless of how this message is conveyed, without it a promise does not create an enforceable \textit{contractual} obligation.\textsuperscript{29} With this message, a promise is presumptively enforceable as a contract.\textsuperscript{30}

For example, when I promised Janice Calabresi that I would take part in this symposium, I certainly did not intend to subject myself to legal sanctions should I for some reason fail to participate. Nor do I think that, while she certainly relied on my promise, Janice could reasonably have believed that I had consented to assume any contractual obligation to appear. Although she may have judged me harshly for withdrawing as a participant, both she and I would consider it to be the height of injustice if I were to be sued for breach of contract. Something more formal or more explicit than our phone conversation would have had to occur to rebut the normal presumption that a promise to speak is not legally binding on the speaker, although I have no doubt that there is a court somewhere that would disagree.

If the promise theory—whether based on the moral rationale of promise-keeping, on the rationale of injurious reliance, or on some other rationale—is the predominant view of the twentieth century, the consent theory, whose roots go back centuries, was probably the predominant contract theory of the nineteenth century (although it is a bit difficult to be sure about this since so much of legal theory in that period was implicit rather than explicit). The view that Williston needed to argue against and which he and others eventually defeated when they succeeded in making promise-keeping the focal


\textsuperscript{27} See Barnett, \textit{supra} note 6, at 310-12.

\textsuperscript{28} See id. at 312-17. See also Barnett & Becker, \textit{supra} note 9.

\textsuperscript{29} However, such conduct could still give rise to legal liability sounding in tort or restitution, provided the requirements of these types of liability are present.

\textsuperscript{30} Because consent is only presumptively binding, other circumstances such as duress, fraud, and incapacitation, if established, could rebut the presumption and defeat a claim for contractual enforcement. See Barnett, \textit{supra} note 6, at 309-10, 318-19.
point of contract theory, was stated by Professor Ernest Lorenzen in 1919: "Agreements which are physically possible and legally permissible should, on principle, be enforceable... if it was the intention of the parties to assume legal relations."\textsuperscript{31} Williston's triumph over this view was reflected in section 20 of the First Restatement which stated that: "neither... the mental assent to the promises in the contract nor real or apparent intention that the promises shall be legally binding is essential [to contract formation]."\textsuperscript{32} This position was adopted in section 21 of the Second Restatement, which states that "neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract. ..."\textsuperscript{33}

By arguing, as I have in my writings on contract, that consent—a manifested intention to be legally bound—is the key to distinguishing enforceable from unenforceable promises, I do not mean to suggest that courts should simply look for this intention unguided by general rules and principles. I suspect that a direct pursuit of these intentions on a case-by-case basis would likely lead to more injustice from the standpoint of consent than it would avoid. To the contrary, the bargain requirement of consideration that plays a pivotal role in both the First and Second Restatements, and which states that mutually inducing promises are presumptively enforceable, is an excellent, though far from perfect,\textsuperscript{34} criterion of consensual obligation precisely because the existence of a bargain so frequently corresponds to the existence of a manifested intention to be legally bound. This means that, in practice, there is often very little difference between a promise theory as embodied in the Restatement and a consent theory.

Still, an exclusive focus on either bargained-for consideration or detrimental reliance, or both, as criteria of contractual obligation creates serious problems of underenforcement and overenforcement. By this I mean a failure to enforce consensual commitments that should be enforced and the enforcement of commitments to which the parties did not consent and therefore should not be enforced. The problem of underenforcement is the concern of those contributors to this symposium, such as Walter Olson,\textsuperscript{35} who complain that consensual commitments to waive tort liability and to as-


\textsuperscript{32} \textit{Restatement of Contracts} § 20 (1928) (emphasis added).

\textsuperscript{33} \textit{Restatement (Second) of Contracts} § 21 (1981). This proposition is qualified somewhat, however, by the further stipulation that "a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.” \textit{Id.} (emphasis added). This may represent a subtle shift in the direction of consent theory.

\textsuperscript{34} See Barnett, \textit{supra} note 6, at 287-91; Barnett & Becker, \textit{supra} note 9.

\textsuperscript{35} See Olson, \textit{supra} note 4.
sume greater than normal risks of harm are held to be unenforceable no matter how demonstrable or knowledgeable may be the exercise of consent by a person assuming such a risk. In this manner, the ability of persons to exercise freedom to contract and avoid the hazards of the tort-law system of negligence is undermined, as Peter Huber and Walter Olson have so graphically described in their writings.  

Consider for a moment the more neglected problem of the overenforcement of promises. One famous example of overenforcement engendered, at least in part, by the promise theory of contract, is the case of Texaco v. Pennzoil. Texaco was accused of having tortiously interfered with a contract that allegedly existed between the Getty Foundation and Pennzoil. Texaco argued, in part, that there was no contract between Getty and Pennzoil for it to interfere with. So, an important issue in the case was whether or not a contract existed between Getty and Pennzoil.

The Texas Court of Appeals took the view that whether a contract existed or not depended on whether the parties “intended to be bound” to the agreement they had apparently reached. Although this formulation sounds like a consent theory standard of “manifested intention to be legally bound,” it could simply be another way of saying that one has made a promise. According to the Second Restatement, “[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.”

While I have no quarrel with this definition of a promise, it implies that everyone who makes a promise is “binding” themselves in some significant sense. Surely, I “bound” myself to come to Washington to give this presentation insofar as I gave Janice Calabresi reason to believe that I had made a “commitment” to attend, even though (in my opinion at least) I did not manifest an intention to be legally bound. Although they never squarely address the matter in Texaco v. Pennzoil, the Texas trial and appellate courts appear to have viewed the crucial issue to be whether or not a promise had been made. They concluded that sufficient evidence of a promise existed to justify the jury’s verdict. If, however, any promise that was made by Getty to Pennzoil was not apparently intended to be legally bind-

---

38 Id. at 789 (“The issue of when the parties intended to be bound is a fact question to be decided from the parties’ acts and communications.”).
ing, then from the perspective of the liberal principle of freedom from contract, this case is an instance of overenforcement.

Another recent case provides an intriguing example of a court attempting to use something like a consent theory of contract, rather than a promise theory, to decide whether a promise should be enforced and to prevent overenforcement. This is the *Cohen v. Cowles Media Co.* case, which has become well-known (and was reversed by the Supreme Court of the United States) because the Minnesota Supreme Court held that enforcing a promise of confidentiality of a reporter to her source violated the First Amendment. For present purposes, the more interesting issue in the case is the contract law issue entirely avoided by the United States Supreme Court but considered by the Minnesota Supreme Court. This is the question of whether the promise of confidentiality made by a newspaper reporter to a source was properly enforceable according to contract law rather than according to the First Amendment. The majority of the Minnesota Supreme Court began its analysis by observing:

A contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach. We think, however, the matter is not this simple.

Unquestionably, the promises given in this case were intended by the promisors to be kept.

The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive. After noting that "in this case... we have a clear-cut promise," the Minnesota Supreme Court went on to offer a consent theory rationale for nonenforcement:

The law... does not create a contract where the parties intended none... Nor does the law consider binding every exchange of promises... We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe that they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the

---

*42* 457 N.W.2d at 202-03.
*43* Id. at 203.
reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. . . . 44

The court then concluded:

In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances. 45

Of course, one can disagree about whether, on the facts of the case, the parties had or had not actually manifested an intention to be legally bound. But, the dissenters focused their fire not on the evidence of intent to be bound, but instead on the majority's implicit rejection of the promise theory, which maintains that the issue of intent to create contractual relations is irrelevant to contract formation. Justice Yetka argued:

The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job. Under established rules of contract law, the appellants should be responsible for the consequences of that broken promise. 46

Justice Kelly, in dissent, explicitly advocated the promise theory:

I remain unpersuaded by the majority's analysis that, notwithstanding that all the elements of a legal contract and its breach are here present, the contract is unenforceable because "the parties intended none." It reaches this conclusion even as it concedes that the promises given by the agents and employees of these defendants was [sic] intended by them to be kept. 47

In sum, both dissenting opinions accepted the conventional approach that a promise is actionable whether or not it is accompanied by a manifested intention to be legally bound. Their passionate dissents on this issue support my interpretation that the majority had in its opinion implicitly rejected the promise theory and, perhaps unwittingly, embraced a consent theory.

44 Id. Notice how this language rejects the moral theory of "contract as promise" offered by Charles Fried.
45 Id.
46 Id. at 205. Notice that Justice Yetka's language implicitly relies on the injurious reliance rationale for enforcing promises.
47 Id. at 206. Of course, had the promisors not intended to keep the promise at the time they made it, the legal theory would have been fraud, not breach of contract. See Barnett & Becker, supra note 9, at 485-95.
Ultimately, however, the majority made the telling theoretical mistake of considering the plaintiff's promissory estoppel argument as wholly unrelated to the issue of intent to contract. By holding that the First Amendment, rather than the lack of contractual consent, barred a promissory estoppel cause of action, the stage was set for the Supreme Court reversal that eventually occurred.

**CONCLUSION**

Those who are interested in maintaining the life of contract should take an interest in the theories of contract that are discussed in the law schools. It is not enough to lambast the courts for reaching results that one intuitively finds absurd. One must also burrow beneath the results to find the flaw in the theory or doctrine that produced the outcome. For, until we discover the theoretical or doctrinal error, we can never be completely sure that it is the result rather than our intuitions that are mistaken.

The promise theory has been accepted for decades because it comports with some of our most basic intuitions about contractual obligations. Unfortunately, where it deviates from these intuitions, the promise theory has led to results and doctrines that have undermined the centrality of consent in contract law and theory. A consent theory of contract preserves much of what is intuitively appealing about the promise theory while incorporating many of the results and doctrines upon which opponents of consent have based their theories. In this way, a consent theory of contract transcends the limitations of the promise theory, and thereby helps to preserve the twin liberal values of freedom from and freedom to contract.

---

48 For an analysis of promissory estoppel from the perspective of contractual consent, see Barnett, supra note 6; Barnett & Becker, supra note 9.
Thank you Judge Bork. I am going to save Professor Barnett until rebuttal. I am now going to attack Justice Grodin a little and Mr. Olson a lot, as he has written a book, exposing him on every flank.

I largely agree with Walter Olson on two principles. One is that you should make your own bed and lie in it. And the other is that you should not whine if the other party reallocates. The first says that if you shift risk or limit liability in your contract, you should be stuck with that. The second says that if one party commits what some law and economics folks call an efficient breach, the other party should not whine or ask for punitives, although the aggrieved party is entitled to compensation. By and large I tend to agree with those principles, but I want to make two exceptions.

One exception is for consumer cases. In Mr. Olson’s chapter on contracts in his book, *The Litigation Explosion*, he spends most of his time on unconscionability cases involving consumers. To show my mean streak, I want to point out that all of those cases were at least ten years old when the book was published. I have a more upbeat message which I will give shortly. But consumer cases are something we might argue about.

Personal injury cases also pose problems. As to them, I have a sense of déjà vu, as this is the room in which the Reporter for Restatement projects in the American Law Institute defends drafts before much less friendly audiences. They tell you what you have done wrong and take votes requiring you to redo your work. One of the things that I had the pleasure of presenting here was a provision in *Restatement (Second) of Contracts* § 195(3): a term exempting the seller of a product from special tort liability for physical harm to a user or a consumer is enforceable if the the term is “fairly bargained for and is consistent with the policy underlying that liability.”

---

† Alfred McCormack Professor of Law, Columbia University. B.S., University of Michigan; M.A., Yale University; J.D., Columbia University. His published works include many examinations of contracts, including his recent three volume *Farnsworth on Contracts* (1990). He was Reporter for the *Restatement (Second) of Contracts* from 1971 to 1980. Professor Farnsworth has been active in international law and has taught at the University of Paris, Harvard, Stetson, the University of Chicago, the University of Istanbul, and the University of Michigan.

1 *Restatement (Second) of Contracts* § 195(3) (1981).
CONTRACTS IS NOT DEAD

you think that is too cautious a statement of freedom of contract, take a look at comment m to section 402A of the Restatement (Second) of Torts, which says that you simply cannot disclaim the liability stated in that section. It took some diplomatic skill to get the American Law Institute to do a flip-flop and say in the black letter something that was the opposite of what they said in the torts comment.

I have limited disagreement with Mr. Olson, but my message is different. His was that contracts is going to the dogs, maybe even dying. Justice Grodin may have reinforced that from another perspective. Judge Bork said that this is what he liked to hear in the morning, a dismal message. Professor Barnett was more upbeat and I intend to be upbeat as well. I do not know whether this will make Judge Bork’s day or ruin his morning. I am going to talk about four developments in the last year or so that seem to be encouraging. I am going to be anecdotal, as Mr. Olson was anecdotal. I am sorry to tell you the anecdotes that I will tell are less funny than his—the ones where the bad guy wins after getting hit by the foul ball or the bad gal wins after botching the recipe by putting the can in without opening it. If those people had lost, however, nobody would have talked about the case and certainly if they had, nobody would have laughed.

Now, point one: you make your bed and lie in it. I think unconscionability in the commercial area is overrated as a subject of discussion. There are franchise cases in which a gas station operator with a high school education does battle with an oil company over an allegedly unfair contract. They are not so different from consumer cases. Then there are people who are now stylishly described as persons in agribusiness but who would have been called farmers a few years ago, and who have trouble reading the things on bags of seed and pesticides. And then there are the unfortunate businesses that get their ads botched or omitted in the yellow pages so that nobody calls them. Those are some of the players in commercial cases. There is a bigger game, however. The cases involving limitations of remedies are much more important. That is a field where things have been in equipoise for nearly ten years and it is interesting to see which way courts might be heading.

Manufacturers and other distributors frequently put in a provision saying that all they will do for you if something goes wrong is repair or replace, and that they are also not liable for any consequential damages. Those are two separate provisions. What the courts did first was to use a rather arcane provision of the Uniform Commercial Code that says if a limited remedy fails of its essential purpose, the court can ignore it and apply any remedy that would
Courts reasoned that if you say you will repair or replace something, but you do not fix it and it still will not work, then the limited repair or replace remedy fails in its essential purpose. You can reasonably argue with that, but that is the way most courts have gone. What is most surprising is that since about 1977 a series of cases called the "house of cards" cases say that if your repair and replacement provision falls, then everything else falls like a house of cards, including the no consequentials clause. You are then exposed to full liability. The first case on that was an 8th Circuit case in 1977 called *Soo Line*. Walter, do not flinch, the word is S-o-o, not S-u-e. Many similar cases have been in the federal courts on diversity jurisdiction and who knows what on earth the state courts would do if they were to decide the cases. In the last year, the Supreme Judicial Court of Massachusetts has come out with a significant decision rejecting the house of cards view and saying that if you put in two distinct provisions and one is stricken under the code, then the other one remains. You can try to attack the negation of consequentials on grounds of unconscionability. But, unless you run a gas station, are buying seed, or are listing yourself in the yellow pages, you probably will not have a great deal of success.

There is another case from a court at least as well-known as the county court that decided the Walter Olsen's *Cubs* case. It is *Carnival Cruise Lines v. Shute*, a consumer case decided by the Supreme Court earlier this year with two justices dissenting. The Shutes, who were from the state of Washington, decided that they would take a cruise to Mexico that originated in Los Angeles. They went to a Washington travel agent, bought a ticket, flew to Los Angeles, got on a ship, and went off to the Mexican coast. Mrs. Shute slipped on a deck mat during a tour of the galleys and, figuring that there was tort liability, sued in Washington. Carnival Cruise Line said, "Look on the back in the fairly fine print. It says you have to sue us in Florida; we are a Florida corporation." The Ninth Circuit had held that this provision was not enforceable. But the Supreme Court said it was enforceable. This case has an interesting discussion which you ought to look at in comparison with Justice Grodin's dis-

---

4 *Soo Line R.R. v. Freuhauf Corp.*, 547 F.2d 1365 (8th Cir. 1977).
8 *Id.* at 1524.
9 *Id.* at 1524-25.
10 *Id.* at 1526-29.
discussion of adhesion contracts. Note that the Shutes lost a fairly appealing case. They were in Washington. They never had any contact with Florida. The Florida company’s ship was operating on the West Coast. They did not go to Florida to take the cruise, but went to Los Angeles to take it to Mexico. Nevertheless, the Court said that the defendant wanted to be sued in Florida, that that is more efficient for the defendant, and that one pays less for a ticket because of that efficiency. There is nothing wrong with an adhesion contract, per se. The mere fact that it is a standard form in what is today’s common method of doing business is not an impediment to enforceability.

The second point is no punitive damages. Although Mr. Olson in his book discussed punitive damages, he did not do so this morning. But other speakers, including Vice President Quayle, have said things at recent meetings about punitive damages. In the early 1980s, when Justice Grodin was a member of the California Supreme Court, the court handed down a unanimous decision, with a separate opinion by Chief Justice Bird, urging the court to go even beyond what they did. It was the Seaman’s Direct Buying Service case, and it extended the bad faith breach liability of insurers, a liability that had spread from California to many other states, where it had also been limited to insurers. By dictum, Seaman’s extended this liability to ordinary commercial contracts not involving insurers, at least as long as the parties had a special relationship. Then many intermediate courts in California went on to discuss what would constitute a special relationship. It was commonly assumed that an employment relationship would be a likely candidate for a special relationship under Seaman’s. But in 1988, the California Supreme Court decided Foley v. Interactive Data. Of the Seaman’s court, only two members remained. Five new members did some violence to the Seaman’s case, and a recent intermediate appellate court case characterized Foley as a drastic change in the Supreme Court’s decision. The winds of change blew in 1988. Before Foley, one could confidently suggest that at least two spheres of contract relationships, insurance and long-term employment agreements, could give rise to bad faith breach and tort damages. But after Foley, only insurance was left, which suggests that California was back to where they were before the Seaman’s case. The Seaman’s case has not been widely followed elsewhere. Montana is a state where bad faith

11 Id. at 1527.
13 Id. at 1166.
14 Id. at n.6.
breach is still alive and well, though no longer a tort.\textsuperscript{17} But certainly the experience in California is an upbeat one for those who think that punitive damages have no place in contracts.

I will mention only briefly another development: punitive damages in arbitration. This raises two questions. One is, “Do arbitrators have power to award punitive damages?” The state that has the most negative view on this question is New York, going back to a case called \textit{Garrity v. Lyle Stewart}.\textsuperscript{18} \textit{Garrity} says that under New York law arbitrators do not have the power to award punitive damages. The other question is, “Would it make a difference if you were in an arbitration governed by the Federal Arbitration Act?” The Federal Arbitration Act\textsuperscript{19} governs international arbitrations and many domestic arbitrations, and I think most people thought that \textit{Garrity} was dead in cases governed by the Federal Arbitration Act because federal arbitration policy would prevail.

In the last year two cases, \textit{Barbier v. Shearson Lehman Hutton, Inc.}\textsuperscript{20} and \textit{Fahnestock & Co. v. Waltman},\textsuperscript{21} were decided in the Southern District of New York, expressing opinions in opposite directions. \textit{Barbier} said yes: the federal act governs even though New York substantive law is applicable; the arbitrators can award punitive damages. \textit{Fahnestock} said no: if New York law governs, the Federal Arbitration Act does not preempt and arbitrators cannot award punitive damages. The Second Circuit has recently passed on the \textit{Fahnestock} case\textsuperscript{22} and has upheld the view that \textit{Garrity} applies even though the arbitration is generally governed by the federal act as long as a New York law is applicable.\textsuperscript{23}

So my message is: I do not disagree with Mr. Olson on some of the fundamental points, especially as applied to commercial cases, but be of good cheer, contracts is not dead. It is not even going to the dogs, but is alive and well. Some of you will remember that both yesterday and this morning in Judge Bork’s introduction, reference was made to the changing role of a changing judiciary. Certainly those of you who look at the \textit{Carnival Cruise Lines} case\textsuperscript{24} in the

\textsuperscript{17} Story v. City of Bozeman, 791 P.2d 767 (Mont. 1990).
\textsuperscript{20} 752 F. Supp. 151 (S.D.N.Y. 1990), aff’d in part and rev’d in part, 948 F.2d 117 (2d Cir. 1991).
\textsuperscript{22} Fahnestock & Co. v. Waltman, 935 F.2d 512 (2d Cir.), cert. denied, 60 U.S.L.W. 3342 (1991), distinguished in Todd Shipyards v. Cunard Line, Ltd., 943 F.2d 1056, 1063 n.6 (9th Cir. 1991) on the ground that in \textit{Todd} “the expansive AAA arbitration provision was a part of the contract.”
\textsuperscript{23} Id. at 518.
\textsuperscript{24} 111 S. Ct. 1522 (1991).
Supreme Court and look at the *Foley* case\textsuperscript{25} in the California Supreme Court will have the view that if the courts as they were constituted ten years ago had faced those cases, they would not be examples that I would have given you this morning for the increasing or at least resurgent role of contract as opposed to tort.

\textsuperscript{25} 765 P.2d 373 (Cal. 1988).
Professor Olson provided us with an amusing and fast moving dialogue. I would like to present an analytic framework focusing upon contract and its relation to tort within the theme of this conference on individual responsibility. To begin, I invite you to accept a series of propositions.

First, governments and private power centers oppress people. That is, employers, labor unions, and insurance companies may oppress. Second, such oppression is a legitimate subject of government concern and action. When private power centers oppress people, it is appropriate for government to intervene through law and address that oppression. Third, contract, while historically the handmaiden of liberty, can also be a tool of oppression. Sir Henry Maine talked about how the progress of the law evolved from status to contract but we know that contract can also be a form of status.\(^1\)

I used to represent labor unions. Labor unions have bylaws and, as their lawyer, I argued that a union’s bylaws should be viewed as a contract among the members of the union or between the union and each member individually. Thus, when a person became a member of a union, he subscribed to a contract and was bound by it. If the contract authorized expulsion from union membership for any reason or by any process, the member agreed to such a provision and should have been held to it.

The courts, quite properly, rejected that proposition\(^2\) and ruled that union bylaws are contracts in name only. They are contracts of adhesion. Such contracts exist when a party with superior bargaining strength imposes a contract upon an individual under circum-

\(^1\) **HENRY S. MAINE,** _Ancient Law_ 170 (14th ed. 1891).
stances where no market really exists—they are a form of status imposed in the guise of contract. Both courts and legislatures imposed limitations upon the union-member relationship that were not limited by the terms of any agreement.

In the employment relationship, similar limitations on contract exist. We cannot contract to sell ourselves into slavery. We cannot give up freedom in return for any amount of money such that a court will enforce the bargain. Legislatively imposed wage and hour laws exist. We also have worker's compensation, which overrides the terms of any contrary agreement. Professor Olson talked about the man at the baseball game. Do we want to live in a society in which a worker, as a condition of obtaining employment, may be required to relinquish any claim to employer liability through worker's compensation or negligence? Title VII, with its limitations upon contract, promotes nondiscrimination principles. The Occupational Safety and Health Act tells us that, as a matter of public policy, questions of safety will not be left entirely to the marketplace. The recent polygraph testing law tells us that a contract cannot determine when an employer may insist upon giving employees a polygraph test or when that employer may rely upon such tests as a basis for dismissal. These are all intrusions upon contract. The aforementioned intrusions are the result of legislative action rather than judicial creations. If what we are talking about is contract versus individual responsibility, however, the source of the incursion is irrelevant.

It is important to recognize that we are not talking about the Madisonian dilemma here. We are not talking about constitutional principles and the autonomy of an unelected judiciary imposing its will upon the democratically elected branches. We are talking about common law. We are talking about a set of legal principles that judges created. Judges may have created those legal principles with attention to standards that permeated the institutions of particular societies. They were created, nevertheless, by human beings and they were not a brooding omnipresence in the sky.

The common law, by definition, is subject to change. A continuing dialogue exists between the courts and the legislature. For example, in the field of labor union regulations, the exceptions to contract principles that courts developed in the adjudicative process came to be adopted by federal and state legislatures. Similarly, in California, the legislature adopted and codified the principles devel-

---

oped by courts. When the legislature did not agree with those principles, it changed them. Thus, there is nothing peculiar about judge-made law with respect to the tension between contract and tort.

The question, then, is not whether we will have some abstract and sacrosanct notion of freedom of contract. The question is, under what circumstances is the law justified in limiting the use of contract by one party to impose conditions upon another that society may regard as oppressive. I suppose the answer is that the justification exists under those circumstances in which we think the market does not operate very well, either because we have some theoretical basis for believing that in particular contexts the market does not operate as the economists tell us it ought to operate—as, I suggest, in the employment context or in the insurance context—or because, as a pragmatic matter, we look at the results and we find them to be unacceptable. Look at the issue of safety in the workplace. We are not prepared to tell a worker who is subjected to unsafe conditions, "If you do not like it, go get a job elsewhere."

Finally, I have a comment on the question of remedies. I think it is important to distinguish between the question, "Under what circumstances should the law impose unwaivable contractual conditions?" and the question, "What kinds of remedies should be invoked for what kinds of obligations?" Again, these questions can be posed to legislatures and to courts. A legislature can readily include additional compensatory remedies and perhaps punitive damages for victims of discrimination. Unfortunately, the common law principles relating to remedies have rigidly developed. Thus, courts have available to them either contract principles or tort principles of recovery, both of which are rather rigid. Contract principles often yield inadequate recoveries for certain kinds of injuries (for example, when an insurance company not only fails to pay benefits provided for in the policy but engages in deceptive practices in the hope that policyholders will abandon their claims). Hiring a lawyer in such a case may not be worthwhile if all that can be recovered ultimately is the amount that was originally owed. In such circumstances, the tort remedy is an alternative that courts have available to them. There are problems with tort remedies, however, especially with respect to unlimited punitive damages. Perhaps the ideal solution does not lie either in the realms of contract or tort doctrine but in more creative remedies that the legislature might develop. That is hardly an argument, however, for holding their hands behind their collective backs and doing nothing.
TORTIFICATION OF CONTRACT LAW:
DISPLACING CONSENT AND AGREEMENT

Walter Olsen†

One of the consequences of recent world events is the impending demise of jokes about communism. For the record, I would like to preserve the one about the veteran party leader who is haranguing the troops—this is before they have taken over—and tells them: “After the revolution, comrades, everyone will dine on strawberries and cream.” A hand goes up at the back of the room. It is a new recruit. “But comrade,” he says, “I don’t like strawberries and cream.”

The leader explains that strawberries and cream is a wholesome and natural dish, universally recognized as a tasty treat, even written up in poetry. He argues very systematically, but the man at the back is unconvinced. “Well, I don’t know why,” he says, “but I just don’t care for them.” At which point the leader loses patience: “Rest assured, comrade, that after the revolution you will like strawberries and cream.”

That is what is called paternalism. It is not confined to any one movement or part of the political spectrum. It tends to crop up wherever utopian ideas are found, and is even found in something as far from communism as the American court system.

The paternalist project for our civil courts runs something as follows. After the revolution—which perhaps has already taken place—the average citizen will enjoy a vast array of wonderful new rights to sue other people. You will be empowered to haul your neighbors and fellow citizens to court if you feel they have fallen short of good faith and fair play. You will be entitled to sue them for unlimited damages, punitive as well as compensatory, even over behavior that had previously been thought not subject to liability at all. Everyone will be under a vague but stringent obligation to look out for your safety and welfare, enforceable by legal action. You will enjoy a cornucopia of contention opportunities, a smorgasbord of suing options, a Lotus-land of litigability.

At this point you may raise your hand, like the recruit, to say that you are not sure you want all these new benefits. You may not

† Walter Olsen is a senior fellow at the Manhattan Institute. He is the author of THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) and editor of NEW DIRECTIONS IN LIABILITY LAW (1988).
want to keep others terrified about how and when they can be sued for dealing with you. You may disagree with the courts' current definition of what is negligent or defective or unreasonable in others' behavior. You may, in short, be inclined to stamp your new legal entitlements "return to sender." But you are out of luck. You will find that many of your rights to sue, like the strawberries and cream, cannot be waived. The rights are grounded not in traditional contract law but in the principles of tort law. They are undisclaimable.

We know the basic differences. Tort law is modeled on the one-sided, gratuitous infliction, as when a stranger drives into your front porch and demolishes it. Nothing is pre-arranged or arrangeable; nothing is of mutual benefit. In a contract situation, your front porch is still ruined, but it is because an incompetent renovator has gotten his hands on it. Tort law is seen as externally imposed; it may reflect what some call natural law, or society's arbitrary decision of who should be responsible for what, but in any case it reflects something other than the choice of the parties. Contract obligations are seen as a product of agreement. Tort law may in some sense reduce itself to: "because we say so"—we being society as a whole or judges or juries. Contract law is supposed to be: "because you said so."

Other distinctions are familiar as well. In tort cases one can typically ask for punitive damages and damages for such hard-to-measure things as pain and suffering, humiliation, and emotional distress. In contract law, the assumption is that absent some signal to the contrary, the parties will not make such demands on each other. The idea is that both sides have tacitly agreed to disarm themselves of the most intimidating legal weaponry as a condition of doing business, even as gunslingers are supposed to check their weapons on entering the saloon.¹

That was then. More recently, in what has been called the tortification of contract law, courts have begun to treat more and more consensual interactions as if they were, in part or whole, gratuitous inflictions of harm. The machinery and weaponry of tort law, including notions of punishment and open-ended damage calculations, are displacing the notion of consent and agreement.

Consider what happened after first baseman Leon Durham hit a foul ball into the stands at a Chicago Cubs baseball game. The ball struck Delbert Yates, Jr., who sued. The admission ticket to the ball

¹ The ban on penalty clauses in contracts, which forces contracting parties to resort to bonding and other stratagems when they want to arrange matters so as to penalize one party for noncompliance, can be seen as an even clearer statement of the law's assumption that, absent strong evidence to the contrary, people will deal with each other only on an understanding not to sue for each other's punishment.
DISPLACING CONSENT

park specifically disclaimed liability for any such event. Additionally, the tradition in baseball is against plaintiff recovery for foul balls, with or without disclaimer. Still, a Cook County circuit court allowed recovery. The ticket made no difference, and apparently would have made none even if Yates had signed it and had it notarized.

In the mortgage world, lenders in Oklahoma and other states are currently faced with a remarkable new judicial innovation elegantly called the “cramdown.” The situation arises when a borrower is bankrupt but is trying to stave off foreclosure. The value of the house has fallen sharply since it was financed. The borrower asks that part of the mortgage simply be amputated to reflect the decline in the value of the house, whereupon the borrower will resume payments on the smaller amount. The court agrees, sometimes, and orders this. As a borrower's attorney put it, “If the lender makes a stupid loan, why shouldn’t he pay for it?” To which the old reply would have been: “Because your client promised he would not.”

Similar trends are seen in employment law, in landlord-tenant law, in insurance law, and so forth. More obligations have been made undisclaimable, more exculpatory clauses have been struck down as unconscionable, more duties have been grounded in public policy rather than the evident agreement of the parties.

One of my least favorite cases along these lines comes from the investment world. Discount stock brokers, who do not maintain research staffs or commissioned salespeople, have been thriving in recent years. To many of us, their most attractive feature is not their low rates (though that is nice too) but that they never call. If you have an account with Charles Schwab, you may sit down to dinner without expecting the phone to ring with an urgent admonition to sell everything they advised you to buy last week and buy everything they told you to sell, for your own good of course. If you want, Schwab will give you direct access to the market over your modem or touch-tone phone, with no human intermediary at all, like a vending machine for stock purchases.

---


5 Jason Zweig, A Touch of Class, FORBES, Feb. 3, 1992, at 82-84 (20 percent of Schwab’s trades come in by way of touch-tone systems, 6 percent by modem).
Unfortunately, some creative lawyers have launched an effort to redefine this blessed neglect as negligence. One of them, representing a client who had made very bad investments, successfully filed a claim against Schwab for, as he colorfully put it, letting his client commit financial suicide. It was ruled that Schwab had an affirmative duty to look after his client's interests and should pay for breaching that duty.⁶

If the ruling stands, it is not hard to predict what will happen. Discount brokers will have to monitor their clients' holdings much more carefully and take affirmative steps to get in touch with clients when they see dangerous patterns. Commission rates will go up, and customers will be back to square one, wondering how to separate the sincere advice from the self-interested churning. In effect, consumers will have lost access to a valuable do-it-yourself option.

My point is that it is frequently quite rational to deal with people who are not being especially careful on our behalf, who we expect to be only human, negligent or worse, who might turn out to injure us or stand by while we injure ourselves. We choose to get into the car with a family member at the wheel whom we consider an incompetent driver. We go on doing business with the friendly dry cleaner who breaks our shirt buttons. We let our neighbors take the short cut across our property although they tread carelessly. We return and buy more items from the sharpster antique dealer because, though you cannot trust his sales pitch, his prices are great.

As we forgive others their trespasses, others forgive us. Imagine the chaos in a modern economy if employers insisted on seeking damages against their workers every time they suffered losses from negligence on the job. If you err on the computer and your company's mainframe shuts down for an afternoon, the company is very unlikely to come after you with a claim for business interruption and lost sales, as it might if you were a stranger whose negligence had done the same damage. The shallowness of your pockets is only one reason. Employers rationally recognize that they have a reputation for good will to protect among their employees and that by forswearing their right to recover damages, they are much more likely to attract and keep workers and get their full cooperation on the job. So they are understood to promise to overlook most negligent behavior—or at least to penalize such behavior with no sanction harsher than dismissal.

So it is with all of us: every day of our lives we pre-forgive someone else's injurious, destructive, or even malicious behavior,

the better to reassure them that they will not be too sorry for having dealt with us. We give free passes to klutzes and hype artists, renegers and downright SOBs, agreeing not to push our legal rights against them to a maximum, because we would rather not forego dealing with them at all. And having made our bed, we are willing to lie in it, although others get more than their precise share of the blanket. None of this seems strange except to the modern legal mind.7

We are frequently warned of the danger of assuming that people can knowingly take care of themselves and assume risks. That view, we are told, is “atomistic,” or suited only to a simpler society; or assumes omniscience on the part of an unwary consumer. In reality, it is urged, most people do not really feel at liberty in their dealings in the market place. They will say that there was no real alternative to applying for a mortgage on such and such terms, or that they were forced to stay at a particular job because no other was anywhere near as suitable, or that they signed a separation agreement under duress because the alternatives at the time of the marital split were just too unpleasant.

Of course there is an element of truth in these characterizations sufficient to provide fuel for discussion. Markets are not perfectly competitive, finding alternatives can be prohibitively bothersome, and emergency situations force people into quick decisions.

But if there is a dot of yin in the yang, a bit of helpless victimization even in the most seemingly voluntary dealings by the sturdiest citizens, so there is also a dot of yang in the yin. Even in the stranger cases, where tort law has always had its greatest intuitive strength, there is commonly a trace at least of consent, agreement, and voluntariness. It is recognized in such traditional doctrines as comparative negligence and especially assumption of risk. In assumption of risk cases there may not be an explicit verbal contract, but there is often a kind of nonverbal signaling. Compare, for example, the Chicago Cubs case with the familiar case where a local stranger stops by to watch an amateur softball game, because it is fun to watch softball games, and is beaned by a foul ball. There is no explicit contract there, no ticket stub like that given out by the Cubs to those who pass through their gate. And yet it is not too

---

7 For one of many examples of the anti-disclaimer view, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 282 (1987) (“If we observe a clause disclaiming negligence, the presumption is that the consumer has been deceived...” (explaining why product liability disclaimers are not enforced in today’s courts)). Landes and Posner hypothesize that any conduct diagnosed by a court as negligence ipso facto flunks a cost-benefit test. They then argue that rational buyers would not voluntarily excuse less-than-cost-beneficial behavior in a seller when the happy alternative is to require it as part of the contract and divide the resulting gains.
hard to see that the spectator moved to the risk and can be said to have voluntarily, if not verbally, evinced a willingness to live with that risk.

Part of our task, then, I would argue, is not only to roll back the intrusion of tort law principles into contractual arrangements, but also to re-import into tort law the contract-like principles that we have kicked out of it. Without some element of consent and mutuality, after all, resorting to law is a simple struggle of all against all, a pure instrument of force and recrimination (albeit perhaps justified) in which people raid each others' stores and demand each others' chastisement.

We read in one book after another that assumption of risk is a dying doctrine, a remnant of the bad old legal regime. Do not believe it. Assumption of risk lives on in the common sense of millions of Americans who go into the back country for a hike, or enter the hospital for an operation, or take out a mortgage, with confident willingness to face a full measure of resulting risk. In speaking to audiences about the litigation explosion, no question comes up as often as this one: people ask, "Whatever happened to personal responsibility?" Why don't people recognize that sometimes they make a bad bargain, or made a bad gamble, and just live with the result? Why do they try to get money by blaming someone else?

The cases that annoy people most are the ones where people are most blatantly trying to evade responsibility. The drunk who fell on the subway tracks in New York and was awarded $9.3 million. See Calvin Sims, $9 Million Won For Loss of Arm In Drunken Fall, N.Y. TIMES, Sept. 21, 1990, at B3. See also Ellison v. New York City Transit Authority, 470 N.Y.S.2d 144 (N.Y. App. Div. 1983).

The would-be suicide who jumped deliberately and was awarded $600,000 million, her case being less sympathetic. Cowan v. Doering, 545 A.2d 159 (N.J. 1988).

The lawsuits brought by—as opposed to against—drunk drivers. Arizona Isn't Immune, WALL ST. J., July 24, 1990.

The case where a woman read a recipe in Woman's Day which began, "put a can of soup in the crock pot," and did not realize that she should open and empty the can of soup. Apparently she got money; the publishers settled the case.

For some time assumption of risk has been unfashionable among legal theorists. But it has never lost its life among the general public. It is the proper legal reflection of the sense of individual responsibility that has made, still makes, and should continue to make America a great and free country.

---

OLSON:

Let me start by saying that I found Randy Barnett’s comments very persuasive. In general, the divergence between one’s moral estimate of promises and what the law has historically enforced has turned out to hinge on what are effectively evidentiary considerations. The doctrine of consideration, the complexities of offer and acceptance, the requirement of a writing, are all methods by which a court can reduce the risk of being mistaken about when there was an actual promise. They raise the requirement of proof, particularly in cases where there is a high likelihood of honest error or of fraudulent claims that a promise was made. The general rule has been that if you can enable a high enough mound of evidence, you can get just about any promise enforced, except for a promise to enslave oneself, where there are historical reasons for an exception.

The difference with unconscionability is that it really puts what I call a penny in the fuse box. It means that no matter how hard you try, no matter how clear the evidence of the other side’s consent, you just cannot do it.

In many ways I agree with Professor Farnsworth that the courts are actually not as badly off as my anecdotes might suggest. Perhaps contract is alive and well, or at least recuperating on a Carnival Cruise ship. And many sports-related assumption of risk cases have gone in the right direction.

Still, I am not entirely comforted to know that individual liberty has been extinguished only in cases involving consumers and small producers. Those are important categories. It seems to me that we may want oil companies to continue giving franchises to people with a high school education rather than demanding post-graduate study. But if those with low education are given special rights to litigate the unconscionability of their franchise agreements, companies are going to draw the opposite conclusion.

Even if deals between large businesses or wealthy persons are seldom voided on grounds of unconscionability or public policy, the arguments can still give them a powerful weapon to use against each other in litigation. If such a claim does not win at trial, it can still be a way to avoid summary judgment, get more access to discovery, and thus raise the imposition value of the case. We may observe that Ivana Trump got past summary judgment when her lawyers attacked her $20-million-plus-mansion-in-Connecticut postnuptial
agreement as unconscionable. This attack gave her lawyers an important bargaining chip.

We eventually get back to Justice Grodin’s critique of the oppressiveness of dealings between private parties. There is not really time to do this topic justice, so I will just pause to note one paradox: we have declared it to be socially intolerable for anyone else to inflict on a consenting adult the same sort of risks that he is perfectly willing to inflict on himself. Consider smoking, the most lethal of voluntary pastimes. Most of us agree that adults should have the right to smoke three packs a day if they wish. But it is also thought unconscionable to allow them to assume the vastly smaller risks of sidestream smoke in the workplace. People may drive fast, live on the wild side, risk life and limb in a hundred ways, so long as it is just for kicks and without a thought; but if someone pays them to do it and they sign a consent form, they are being oppressed.

One of the curious facts in the world of occupational safety and health is that the most dangerous conditions and highest injury rates occur disproportionately often in family businesses: farms, fishing boats, backyard mines and lumbering operations, and small construction outfits where the work force consists mostly or entirely of the owner and family members. People are choosing an alarming level of risk, or choosing it for their dearest family members, but there is no visible oppressor on the scene.

On insurance bad faith, finally, I would point out that the basic problem here is that we do not routinely award legal fees to the prevailing party. Most countries do, which encourages insurers to pay up promptly when they are liable on a claim. The equally welcome corollary is that fee-shifting discourages claimants from pressing dubious or exaggerated claims against insurers. It is about time we joined the rest of the world on this point.

GRODIN:

I want to focus on this Carnival Cruise case because I think it is interesting. The analysis that Professor Farnsworth offers is that the choice of law provision is efficient in that it reduces the cruise line’s cost and therefore reduces the amount that people have to pay in order to take a cruise. Of course, there is no denying that proposition. The same analysis is universally available. If I am admitted to a hospital and the hospital, as a condition of admission, asks me to sign a form waiving any liability on the part of the hospital for negligence, no matter how gross, there is no question that this provision serves the economic interests of the hospital and indirectly the interests of patients: it lowers the costs of medical care. That kind of argument can be used to support not only a cruise line’s choice of law provisions, but any provision in any contract. The question is,
"What do we mean by choice?" The Shutes, we can say, did not have to take a cruise. But what do we say to a person who is about to enter the hospital? That he ought to ask for forms from other hospitals to see whether he can find a hospital that will perform the operation without such a waiver or reconsider whether, after all, he needs an operation? For people who are concerned with contract as an instrument of choice, I think we have to ask ourselves what we mean by that in the real world.

And finally, one observation about the Foley case. With all respect, I do not read the Seaman's case the way Professor Farnsworth does. I participated in the decision. I do not think that it stands broadly for the proposition that a breach of the covenant of good faith and fair dealing in the commercial context gives rise to tort remedies. Quite the contrary. The opinion contains a lot of language—most of which I suspect Professor Farnsworth would argue with—discussing why that might be inappropriate and rejecting the notion that a jury should be left to determine when a breach is an "efficient" breach.\footnote{Seaman's Direct Buying Serv. v. Standard Oil Co., 686 P.2d 1158, 1166-70 (Cal. 1984) (passim).} The opinion suggests that breach of the covenant would be appropriate as a tort only in rather narrow circumstances, of which in California the insurance context is one. There is a footnote in Seaman's suggesting that the employment context might also be appropriate for such treatment,\footnote{Id. at 1166 n.6.} but Foley declines to accept that suggestion.\footnote{Foley v. Interactive Data Corp., 765 P.2d 373, 389-401 (Cal. 1988).}

I can understand the policy arguments for why an employer who has breached his contract with an employee, even under circumstances in which it could be said that he has done so in a manner inconsistent with the covenant of good faith and fair dealing, should not be subject to the range of remedies commonly associated with tort doctrine. On the other hand, I think it has to be recognized that the effect of the Foley case is that in California the only people who can now bring suit against their employers for breach of contract are people who are in the high wage brackets and whose claim is sufficient to warrant litigation. People who earn less, your Joe Boilermaker, can no more sue his employer for breach of contract as a practical matter than, in the old days, a member of the union could sue the union for oppressive conduct.

I find myself agreeing with Mr. Olson that the way out of this dilemma ideally does not lie in the direction of choosing tort remedies over contract remedies, but rather by reframing the kinds of remedies that we have for breach of contract, perhaps expanding...
them, and almost certainly including attorney's fees. I think that is at the very heart of the problem. And it is one of the dilemmas the courts confront in this arena.

FARNSWORTH:

I have three very quick points. The first is with respect to Mr. Olson's remarks on franchisees. One of the things that has been left out is that legislation is far more important than this discussion would suggest. The law of franchisees in most states is dominated by legislation and that is true of the whole consumer area. So as for these stories about what courts are doing, the total impact is a lot less important than what legislatures have done, at least in the consumer area.

On the Shute case, I may have done some disservice to Justice Blackmun, who wrote the opinion, by giving such a short summary. What I said was essentially his argument, not mine, and I think he would have no difficulty in distinguishing the cruise line from the hospital. Many states have distinguished hospitals from other activities—notably, sky diving and stock car racing come to mind—and I wonder how Justice Grodin would deal with an exculpatory clause in one of those two kinds of activities. Most courts have said that though you do not choose the form on which you contract, you choose to engage in those activities.

As to the Foley case, my discussion of that case and Seaman's consisted largely of a quotation from an intermediate court that interpreted it. Review was denied on that intermediate court case by the California Supreme Court, one judge dissenting. The dissenting judge, who apparently found fault with the lower court's description of what happened, was the surviving member of the original Seaman's court, Justice Mosk.

QUESTION:

Won't many of the legislative proposals for tort reform take the form of having the federal government act in a number of ways? My question is prompted because we have both constitutional and contract scholars on the panel. What are the preemption implications of these proposals for congressional action from both a policy and a constitutional perspective?

BARNETT:

I refuse to answer, Senator, on the grounds that it may incriminate me. I really do not know that I have an answer except to say that I am somewhat troubled by the trend to make private law mat-

---

6 Id.
ters a matter of federal statute, which we see, for example, in the tort reform movement. And that does not really go to the preemption question, but it does at least go to my reaction. As much as I would like to see tort law reform and contract law reform at the local level, I am troubled by federal legislation that would accomplish that purpose.

OLSON:

Part of the answer to Randy's qualms is that changes in jurisdiction and choice of law have unfortunately enabled states to impose their forum and law on more and more transactions that belong in part, often in predominant part, to other states. This in turn has made it far easier for states to externalize the costs and internalize the benefits of their litigation, getting money for their citizens at the expense of citizens elsewhere. The lawsuits and the redistribution of wealth are already interstate, and the reforms may have to be interstate as well, unless we can turn back the clock on jurisdiction and choice of law.

QUESTION:

Mr. Olson, you present in your paper a number of outrageous, if not humorous, cases. I wonder to what extent they are typical and to what extent there were changes on appeal. This is a big country and you can always find something of an oddity. Your cases are reminiscent of those cited some years ago in the Aetna ads. I wrote to Aetna for the citations of the cases that they had. Every one, while it may have been costly for the parties, was reversed on appeal.

OLSON:

I would not, in the first place, lightly brush aside the injustice of subjecting someone to a wrongful suit simply because it does not prevail in the end. It is cold comfort to win final vindication from a lawsuit when you may have been absolutely ruined by the cost of fighting it. Our legal system seems to congratulate itself over these cases, like a doctor who pats himself on the back for finally getting the diagnosis right although the process of taking biopsies killed the patient.

In several of the cases I cited, there were settlements. Settlements are forever, so we know money was paid. Sometimes the settlement was after a jury verdict, sometimes before. I am relying on newspaper accounts in the subway cases. I think they check out.

QUESTION:

Wally Olson suggested that there really is cause for gloom after all. He suggested, I think rightly, that even if a few cases are coming
out correctly, even if a lot of cases are coming out correctly, that this is not the answer.

In extending from Justice Grodin’s remarks about the need for attorney’s fees in the case of successful plaintiffs in certain kinds of actions, does this suggest that there is a need for an expanded notion of the British rule on attorney’s fees in the case of unsuccessful plaintiffs?

GRODIN:

I think the question you raise is a legitimate one. It is one that I have been concerned with a good deal. I was on a committee of the state bar in California that was considering recommending something like the British rule, and we were on the verge of doing that until we learned that in Britain there had been what was regarded as very considerable reform to the rule. The reform was that plaintiffs in consumer actions were exempt from liability for attorney’s fees on behalf of defendants. And that made us think that there are problems with a legal situation in which someone is penalized or has to incur substantial sanctions for bringing an action which is on the verge of the law, which tests new principles of law, which is brought in good faith and so forth. And I think there probably have to be some exceptions for that.

I really am concerned, however, with the contracts situation. It seems to me that a general principle of liability for attorney’s fees for the prevailing party is not a bad principle and that one of the most egregious problems in the current situation is the case where someone can say to a party to a contract: “Yeah, go sue, maybe I owe you this money. But your lawyer is going to tell you that you have to discount it by such an extent that you cannot afford to bring the lawsuit.” And that is not conducive to liberty or justice or anything else.

OLSON:

Two more points on the representativeness of cases and on the legal system’s role in determining injury. First, the actual decided cases are just a small percentage. Most of the damage is being done in negotiations and shakedowns. Second, the injury that we do not hear enough complaints about from the trial lawyers is the injury that litigation does to the opponent, guilty or innocent. This injury is not exactly anecdotal. It tends to go on in every case—a 100 percent anecdote rate, if you please—and to be the routine and expected outcome of litigation in our courts.

QUESTION:

I have a two-part point to make to Professor Grodin and I would like a response from Professor Barnett as well. I would like to
know from Professor Grodin if he really believes that anyone has a choice in the contracts and agreements he or she makes. It seems from your remarks that you believe that the labor union member does not participate in any sort of market for labor; that a person choosing a hospital or an HMO does not really have any choice. And I wonder if you really believe that the market does not exist anywhere.

The second point that I have relates to some research, and I only know it vaguely from remarks that Professor Allen Schwartz has made at Yale. He has suggested that not every participant in a market must look at every single aspect of the choice that he or she makes in order for the market to efficiently allocate resources. In light of those findings, if you accept their validity, does not that reflect that only a few people have to choose the hospitals they enter, or the cruise ships in which they embark in order for the market to efficiently come up with the right exculpatory courses and the right allocation of costs?

GRODIN:

Well, on the first question, I certainly do think that most contracts are the product of choice in the commercial arena. I agree with Professor Farnsworth's distinction between the cruise ship and the hospital. I think that while it is possible to talk about choice among cruise ship operators with respect to choice of law provisions, I do not think that this is very meaningful. Certainly we can talk about choice about whether one goes on a cruise ship or not and I suppose it would not pain me if the rule were that if you go on a cruise ship, you are stuck with whatever choice of law provision appears on your ticket. I see a very substantial distinction between that and the hospital situation. I do not think there is much of a market—a real market—with respect to choice of hospitals and limitation of liability. I do not think it is realistic to talk about that. The question then becomes where other things fit. For example, I think that there is a lot of choice in a lot of employment relationships and very little choice in others. We have to make decisions about the operation of the labor market in general and we have to look at particular results. Efficiency is not everything. If the market produces a situation in which workers are subjected to toxicity in the workplace, then that is a lousy market and we ought to do something about it.

BARNEtT:

Obviously I take a different view of the matter. I think there is far more choice in the market than Professor Grodin and people who argue this position believe. The issue for them is not really whether there is a choice or not. The issue is whether they can make
a choice-based argument against contract in order to turn the underlying support of contract on its head. They make a choice-based argument in order to bring about the death of contract, but they are not really sincere in all cases in their concern about real choice.