

THE RICHNESS OF CONTRACT THEORY

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INTRODUCTION: THE GENERATIONAL SHIFT IN CONTRACTS SCHOLARSHIP

When I teach the doctrine of good faith performance, I assign an exchange between two distinguished contracts scholars, Robert Summers and Steven Burton, that has come to be known as the “Summers-Burton” debate.¹ This debate is interesting not only for the contrasting views of its protagonists concerning the doctrine of good faith, but also because of the generational shift in modes of scholarship it represents.

In the 1950s and 1960s, contracts scholars, like so many others, rejected so-called “conceptualist” or “formalist” approaches that attempted to dictate the outcome of cases with general concepts and rules. Contracts scholarship was dominated by supposedly “realist” inquiries into the complexities of actual commercial practice, inquiries which sought to identify the multiple factors or considerations that judges do or should take into account when deciding cases. Usually it was denied that these factors could or should be weighted or organized in some manner in advance of a legal dispute. Any effort to reduce the vast complexity of the real world of commercial practice to some verbal formula was dismissed as “reductionist” or “simplistic.”

The *Oxford English Dictionary* defines “reductionist” as: “An advocate of reductionism; one who attempts to analyse or account for a complex theory or phenomenon by reduction.”² And it defines “simplistic” as: “Of the nature of, or characterized by, (extreme) simplicity. Now usu[ally] with the connotation of excessive or misleading simplification.”³ An 1881 example of the word’s usage captures the “realist” spirit that eventually captured the imagi-

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1. See RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW 250-67 (1995).
2. 13 OXFORD ENGLISH DICTIONARY 437 (2d ed. 1989).
3. 15 *id.* at 501.

nation of legal scholars: “The facts of nature and of life are more apt to be complex than simple. Simplistic theories are generally one-sided and partial.”⁴

Professor Summers is of the generation of legal academics that was taught by the vanguard of “realist” professors — a generation that took their teachers’ gestalt and terminology to heart. For example, to explain the implied duty of good faith performance in his seminal 1968 article, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*,⁵ Summers proposed a series of six categories of bad faith performance: (a) evasion of the spirit of the deal, (b) lack of diligence and slacking off, (c) willfully rendering only “substantial performance,” (d) abuse of a power to specify contract terms, (e) abuse of a power to determine compliance, and (f) interfering with or failing to cooperate in the other party’s performance.⁶ In terms that embody the spirit of the realist generation (and of those whom the realists taught), Summers explicitly denied that any more general conception of good faith was helpful or even possible:

It is submitted that any but the most vacuous general definition of good faith will . . . fail to cover all the many and varied specific meanings that it is possible to assign to the phrase in light of the many and varied forms of bad faith recognized in the cases. . . .

. . . [G]eneral definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity.⁷

A judge, he advised, “should not waste effort formulating his own reductionist definitions. Instead, he should characterize with care the particular forms of bad faith he chooses to rule out”⁸

In the 1970s and 1980s, this attitude toward scholarship began to change. Legal scholarship shifted away from realist modes toward what came to be called “legal theory.” Contracts scholarship, like other fields, came to be dominated by scholars who risked the epithets of “reductionist” and “simplistic” in search of unifying theories of legal doctrine. For reasons I have elaborated elsewhere,⁹ I attribute this generational shift initially to the rise of law and economics — which directly responded to the consequentialist or “pol-

4. *Id.*

5. Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

6. *See id.* at 232-43. In this same article, Summers also provides five circumstances indicating “bad faith in the negotiation and formation of contracts,” *id.* at 220-32, three instances involving “bad faith in raising and resolving contract disputes,” *id.* at 243-48, and four forms of “bad faith in taking remedial action,” *id.* at 248-52.

7. *Id.* at 206.

8. *Id.* at 207.

9. *See* Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984) (book review).

icy” concerns of the realists — and to the subsequent emergence of normative legal philosophy that sought to trump the “conservative” conclusions of efficiency theorists that many “progressive” legal scholars found unpalatable. As a result, scholarship like Robert Summers’s realist lists of multiple factors that judges, in their discretion, needed to take “into account,” began to give way to more systematic theories and approaches.

One of these was a comprehensive theory of good faith performance developed by Steven Burton, which he presented in his 1980 article, *Breach of Contract and the Common Law Duty to Perform in Good Faith*.¹⁰ According to Burton, the problem of good faith performance arises when a contract gives one party a degree of discretion in performing, and this discretion is then used by that party to recapture an opportunity foregone at contract formation. So to determine whether a party has acted in bad faith, one must identify both an opportunity objectively foregone and a subjective intention to recapture it.

Burton contended that without “an operational standard that distinguishes good faith performance from bad faith performance,”¹¹ the general requirement of good faith as contained in the Uniform Commercial Code “appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable and inconsistent applications.”¹² And he specifically took issue with Summers’s “list of factors” approach: “No effort is made to develop a unifying theory that explains what these categories have in common. Indeed, the assertion is made that one cannot or should not do so.”¹³ In contrast, Burton argued that “[r]epeated common law adjudication, however, has enriched the concept of good faith performance so that an operational standard now can be articulated and evaluated.”¹⁴ Burton’s theory was based on “a survey of over 400 cases in which courts explicitly refer to good faith in performance,”¹⁵ but also on a basic low-tech efficiency analysis.¹⁶

Summers did not remain silent in the face of this challenge, and his response was methodological as much as it was substantive:

My view is that all such efforts to define good faith, *for purposes of a section like 205*, are misguided. Such formulations provide little, if

10. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) [hereinafter Burton, *Breach of Contract*]; see also Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981).

11. Burton, *Breach of Contract*, *supra* note 10, at 369.

12. *Id.* at 369-70 (footnote omitted).

13. *Id.* at 369 n.5.

14. *Id.* at 370 (footnote omitted).

15. *Id.* at 380 n.45.

16. See *id.* at 392-94.

any, genuine *definitional* guidance. Moreover, some of them may restrictively distort the scope of the general requirement of good faith. . . . Finally, the very idea of good faith, if I am right, is simply not the kind of idea that is susceptible of such a definitional approach.¹⁷

Substantively, he argued that Burton's two-part inquiry was not helpful to deciding cases, that it did not focus on the right things, and that it did not go far enough.¹⁸

Burton responded with a thoughtful, and I think persuasive, reply to Summers's critique, in which he characterized the difference in their methodologies — the difference that I am calling generational:

We want our language to call our attention to the facts that matter — those that legitimately establish similarities with or significant differences from the precedents. . . . We want to know which facts shall count for more than their truth because they are legally significant.

Language can perform this function in a number of ways in addition to 'positive definitions.' Professor Summers' preference for "lists of factors generally relevant to the determination" favors one form that could be employed, in theory. . . . A second form that could be employed, however, is the general description or model — a simplified representation of a complex reality. . . . Unlike most lists of factors, the general description technique encourages us to focus on complex webs of relationships among the facts.¹⁹

Or, in the words of P.J. O'Rourke: "Complexities are fun to talk about, but, when it comes to action, simplicities are often more effective."²⁰

In drawing attention to a generational shift in modes of scholarship, I do not wish to exaggerate it. Not everyone took the turn to unifying theory. Most notable among contracts scholars who did not are those associated with the Wisconsin Contracts Group²¹ and those who were attracted to relational theory.²² Nevertheless, both of these schools of thought grew out of the influence of two scholars who were born within four years of Robert Summers at the begin-

17. Robert S. Summers, *The General Duty of Good Faith — Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829-30 (1982).

18. See *id.* at 830-34.

19. Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 509-10 (1984).

20. P.J. O'Rourke, *EAT THE RICH: A TREATISE ON ECONOMICS* 209 (1998); cf. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

21. See, e.g., STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (1995).

22. See, e.g., Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992). For a summary and critique of communitarian relational theory, see Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175 (1992).

ning of the Great Depression: Stewart Macaulay and Ian Macneil.²³

Summers has not been without his own influence, particularly on his Cornell Law School colleague and casebook coauthor,²⁴ Robert Hillman. Hillman, a 1972 graduate of Cornell himself, began teaching in 1975 at the University of Iowa, where Steven Burton arrived two years later in 1977. They taught together for five years when, in a career move that starkly symbolizes his choice of scholarly models, Hillman left Iowa in 1983²⁵ to join the faculty of Cornell and his mentor Robert Summers.

I. HILLMAN'S CRITIQUE OF CONTRACT THEORY

Over the past twenty-five years, Professor Hillman has made many valuable contributions to contracts scholarship,²⁶ but early on he expressed his discomfort with what he labeled "modern contract theory." In 1988, five years after moving from Iowa to Cornell, he published an essay, *The Crisis in Modern Contract Theory*,²⁷ in which he laid out a general critique of unifying theories, and which he has now expanded into a book, *The Richness of Contract Law*.

The title of Hillman's book is intended to emphasize the fact that contract law is far more complex and "rich" than modern unifying contract theories seem to acknowledge:

Contract law includes a rich combination of normative approaches and theories of obligation. It is divided by special rules for distinct kinds of contracts and is subject to many exceptions and counter-principles. Despite its many dimensions, contract law is a credible, if not flawless, reflection of the values of the surrounding society. A highly abstract unitary theory illuminates contract law, but it cannot explain the entire sphere. [p. 6]

Contract law and theory include contradictions and distinctions. Subject to competing norms and distinct theories of obligation and to various exceptions within the main body of doctrine, and divided by special rules applying to distinct kinds of contracts, contract law does not fit neatly into any slot. *A highly abstract core theory simply cannot account for an entire subject.* Instead, contract law is a plausible, if

23. Summers was born in 1933; Macaulay in 1931; and Macneil in 1929.

24. See ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION* (2d ed. 1992).

25. The year after Hillman departed, Eric Anderson joined the Iowa faculty. Anderson's subsequent contracts scholarship is clearly in the mold of Steven Burton. See, e.g., Eric Anderson, *A New Look at Material Breach in the Law of Contract*, 21 U.C. DAVIS L. REV. 1073 (1988) (providing a unified theory of material breach).

26. See, e.g., Robert A. Hillman, *Court Adjustment of Long-Term Contracts: Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1. I included an excerpt from this article in my anthology, *Perspectives on Contract Law*. See BARNETT, *supra* note 1, at 357-68.

27. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEXAS L. REV. 103 (1988).

not perfect, reflection of various normative choices of the surrounding society. [pp. 273-74; emphasis added, footnotes omitted]

Throughout the book, Hillman offers a number of useful insights about various issues of contract law and theory — as he has in his numerous law review articles — but in this review I shall be concerned with his overall theme: a general skepticism about “unifying” or “highly abstract” contract theories that fail to mirror the richness of contract law. In this regard, he stands in the “realist” tradition of the previous generation of contracts scholars. Hillman attempts to justify this stance by examining a number of doctrinal contexts: contract formation, unconscionability, and good faith. He considers a variety of theoretical approaches: promise theorists, reliance theorists, feminist theorists, efficiency theorists, relational theorists, and critical legal scholars.

But though Hillman professes to be concerned with unifying contract theories in general, he seems to be primarily troubled by theories with which he disagrees. For example, he offers no criticism of feminist theory and, indeed, accepts Mary Joe Frug’s characterization of his own analysis as “feminine.”²⁸ After ten pages of uncritical summary of contract theories by critical legal scholars, Hillman concludes that he finds the “CLS [critical legal studies] indeterminacy thesis” to be “quite persuasive,” though, without elaborating, he adds, “[i]n the end, contract law is probably not as indeterminate as CLS wants to claim” (p. 209). His critique of relational theory is similarly tepid, dismissing numerous lengthy published criticisms of relationalism, which he dutifully cites,²⁹ with a single unsupported sentence: “These criticisms seem to underestimate the judicial capacity to engage in a highly contextual investigation and to evaluate the relevant relational norms” (p. 260) — though he allows that “one *can* overstate the conclusions suggested by relationalism” (p. 260).

28. Frug concluded that my approach “neatly fits the popular interpretation of . . . virtuous feminine attitudes toward justice” because it “is characterized by a concern for multiple objectives, by an appreciation of contextualized relationships, and by a desire to achieve flexibility and sharing in the administration of contract remedies.” Moreover, my analysis “offer[s] a critique of the male model which is both powerful and also reminiscent of typical feminine criticisms of masculinity.”

P. 160 (quoting Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1036, 1037 (1992) (alterations in original)).

29. He cites the following criticisms of relationalism without identifying where any are mistaken (p. 259 nn.82-85): MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 141-42 (1994); Barnett, *supra* note 22, at 1200; Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 142 (1992); Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 2 S. CAL. INTERDISC. L.J. 91, 103, 108, 111 (1993); Melvin A. Eisenberg, *Relational Contracts*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 291 (Jack Beatson & Daniel Friedmann eds., 1995).

This is, unfortunately, a general tendency of this book. Theories with which Professor Hillman appears sympathetic are presented with little or no criticism beyond footnote citations to the published criticisms of others, whereas he takes to task those theories with which he disagrees. Professor Hillman is, of course, well within his rights to agree or disagree with particular theories — in short, to *take sides* in a theoretical debate. But this book purports to be about the deficiencies of abstract or general contract theory *per se*, which he formerly had referred to as in a “crisis.”³⁰ He attempts to claim a higher ground than those locked in “theoretical debate” (p. 7). If that is truly his thesis, then it is only selectively applied.

Moreover, just as he neglects the richness of published criticisms of theories he likes, he overlooks the richness of contract theories with which he disagrees. This is evident in his treatment of the basis of contractual obligation. There, his rhetorical stance is to rise above the debate between Grant Gilmore’s “death-of-contract” thesis and Charles Fried’s theory of “contract-as-promise.” Hillman’s argument is that

neither school has offered a compelling and definitive theory. Although based in part on promissory principles, modern contract law is also tempered both within and without its formal structure by principles, such as reliance and unjust enrichment, which focus on fairness and the interdependence of parties rather than on parties’ actual agreements or promises. Contract law is complex, contradictory, and, ultimately, inconclusive on what the relationship of these principles is and should be. Moreover, by ignoring or downplaying counter-principles and theories, some theorists camouflage contract’s complexity and hence disguise its true nature. The theoretical debate therefore diverts the focus from the reality that promissory and non-promissory principles share the contract law spotlight, and that this is all we can and need to know.³¹

Throughout the book, Hillman speaks of the complexity of contract law as though anyone with whom he disagrees is unaware of this complexity. He does not seem to realize that one function of contract theory is to *understand* and sort out complexity rather than merely report it. Another is to *assess* contending principles and “counter-principles and theories” (p. 7), when contract law is “ultimately[] inconclusive on what the relationship of these principles is and should be” (p. 7). Still another function is to *reshape* and *improve* the law of contract, to move it beyond where it currently resides. Of course, Hillman really does understand all this. His own writings attempt these very objectives. This is merely an unfortu-

30. See Hillman, *supra* note 27.

31. Pp. 7-8 (footnotes omitted). In support of his claim that “some theorists camouflage contract’s complexity and hence disguise its true nature,” Hillman cites Ian Macneil, of whose abstract unifying contract theory Hillman offers no criticism. See p. 7 & n.3.

nate posture he assumes when speaking of theories with which he disagrees.

For someone concerned with complexities, however, Hillman offers what the “realist” generation might call a simplistic and reductionist presentation of the current state of “modern contract theory.” Grant Gilmore wrote in 1974 and Charles Fried in 1981. Hillman’s book was published in 1997, though Chapter One closely tracks his 1988 essay. In the intervening sixteen years, many others have weighed in on these matters.

In 1986, for example, I offered a “consent theory” of contractual obligation that differs from both Gilmore’s and Fried’s theories,³² though being closer to the latter than to the former. Far from ignoring the fact that “modern contract law is also tempered both within and without its formal structure by principles, such as reliance and unjust enrichment, which focus on fairness and the interdependence of parties” (p. 7), I surveyed the “core concerns of contract law”³³ — “will, reliance, efficiency, fairness, bargain”³⁴ — and explained how, while each has merit, “none provides a comprehensive theory of contractual obligation.”³⁵ What is needed, I suggested, is a “framework that specifies when one of these concerns should give way to another.”³⁶ I proposed the criterion of *manifested intention to be legally bound*, or “consent,” as the best way to reconcile the competing demands of these disparate principles.³⁷ Since then I have elaborated upon this approach,³⁸ and it has been

32. See Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992).

33. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271 (1986).

34. *Id.* Later I added “unjust enrichment” to this list. See RANDY E. BARNETT, *CONTRACTS CASES AND DOCTRINE* 637-38 (1995).

35. Barnett, *supra* note 33, at 271.

36. *Id.*

37. For a summary of how “consent to be legally bound” accomplishes this integration, see BARNETT, *supra* note 34, at 651-54.

38. See, e.g., Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POLY. 179 (1986); Randy E. Barnett, . . . and *Contractual Consent*, 3 S. CAL. INTERDISC. L.J. 421 (1993); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POLY. 62 (1992); Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 CARDOZO L. REV. 525 (1990); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POLY. 783 (1992); Randy E. Barnett, *Squaring Undisclosed Agency With Contract Theory*, 75 CAL. L. REV. 1969 (1987); Randy E. Barnett & Mary Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentation*, 15 HOFSTRA L. REV. 445 (1987).

criticized insightfully,³⁹ especially by Richard Craswell.⁴⁰ While nearly all of these articles are cited by Hillman, none are discussed.⁴¹ In writing a book that purports to criticize the endeavor of “unifying contract theories,” one has an obligation to address more comprehensively than Hillman does the richness of such theories, rather than to reduce all of them to either “promise or non-promissory principles” and cite the existing literature without comment.

True, one could fault, as others have, my attempt to adjudicate the claims of these contending principles of core concerns of contract law. But the most important claim that Hillman makes in this regard is his denial that any such adjudication is needed. Recall his statement: “The theoretical debate therefore diverts the focus from the reality that promissory and nonpromissory principles share the contract law spotlight, *and that is all we can and need to know*” (pp. 7-8; emphasis added, footnotes omitted). While he is in good company in making such a claim, I think he is wrong. At a minimum, we should seek a theoretical reconciliation, if such can be had. Ironically, the failure to do so will blind us to the true complexities and richness of contract *law*, as it may have blinded Hillman to the complexities of promissory estoppel.

II. PROMISSORY ESTOPPEL AND THE NEED FOR CONTRACT THEORY

Not too long ago, I published a short essay, *The Death of Reliance*,⁴² in which I reported the scholarly consensus — including such diverse writers as Daniel Farber & John Matheson, Juliet Kostritsky, Edward Yorio & Steve Thel, Mary Becker, and Michael Kelly⁴³ — that had emerged over the past fifteen years or so, that detrimental reliance was not the key to understanding the doctrine of promissory estoppel. The scholarly literature on that point strongly suggested that detrimental reliance was not necessary to a promissory estoppel theory; its existence was not alone sufficient to support a promissory estoppel theory; and the measure of recovery

39. See, e.g., TREBILCOCK, *supra* note 29, at 121, 184; Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1111 n.57 (1989); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 703-08 (1990).

40. See Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 523-28 (1989). For my reply, see Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 874-97 (1992).

41. See, e.g., p. 18 n.61 (“For another unitary theory of contract based on consent, see Randy E. Barnett [citing Columbia & Virginia Law Review articles].”).

42. Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996).

43. See *id.* at 522-27 (providing citations).

in promissory estoppel cases was typically the expectation interest, not the reliance interest. In sum, those adhering to a “reliance theory” of promissory estoppel were barking up the wrong tree.

Hillman disagreed. In 1998, he published an article reporting his survey of “all of the reported decisions in the United States . . . in which promissory estoppel was discussed from July 1, 1994 through June 30, 1996.”⁴⁴ While he presents many interesting findings about the frequency and success of actions based on promissory estoppel, among them is one that challenges the scholarly consensus on promissory estoppel that I had summarized. Contrary to the “new consensus,” reliance appears to be a definite requirement of promissory estoppel cases. The existence of reliance is discussed in 27 of 29 (93.10%) of those cases in which a promissory estoppel action succeeds on the merits and in 32 of 57 (56.14%) of those cases in which it survives a motion to dismiss. Where promissory estoppel actions fail, a defect in reliance is discussed in 151 of 270 (55.93%) of the cases, and a defect in reliance *alone* is discussed in 68 of 270 (25.19%) of the cases.⁴⁵

Curiously, while Hillman reports the total numbers of cases in which the absence of a promise (129), ambiguity of a promise (28), or refusal to accept parol evidence to prove the existence of a promise (8), was discussed as a reason for the failure of a promissory estoppel action, he does not provide the percentages of total cases these figures represent. And he does not provide the number of cases in which the defect in the promise was the *only* reason discussed by the court for the failure of a promissory estoppel claim. We can hazard a guess at these figures from his statement in a footnote that: “One or more reasons constituting a defect in the promise were discussed in half of the cases (135 cases). The court failed to discuss a defect in reliance in only 52 of those cases.”⁴⁶ From this information we might surmise that in 135 (50%) of the cases, one or more defects in the promise was discussed as the reason for the failure of a promissory estoppel claim, and in 83 of 270 (30.74%) of the cases, the failure of a promise was the *only* reason discussed — as compared with the 25.19% of the cases in which a failure of reliance is the sole reason for denying recovery. From all this Hillman concludes that: “Overall, the picture that emerges is that neither promise nor reliance dominates as a judicial reason for the failure of promissory estoppel claims. Rather, both elements are crucial to recovery.”⁴⁷

44. Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 582 (1998).

45. *See id.* at 589.

46. *Id.* at 599 n.87.

47. *Id.* at 599.

Hillman's article is truly an important contribution to the promissory estoppel debate, and, for this reason, I have included two excerpts from it in the forthcoming edition of my casebook. His research shows that previous studies may well have been wrong to dismiss reliance as a necessary basis for recovery. On the other hand, the data might also mean that the absence of reliance was dispositive in only twenty-five percent of the cases in which promissory estoppel claims are denied. That undercuts the previous wisdom — still prevalent among most contracts professors — that detrimental reliance is the *sine qua non* of promissory estoppel.⁴⁸ This conclusion is also supported by the facts that (a) defects in the promise are the only reason provided in 30.74% of the rejected promissory estoppel claims, and (b) detrimental reliance is not discussed at all in 44.07% of the cases in which promissory estoppel actions fail. Thus, reliance may well still be dead as the *exclusive* theory of promissory estoppel, which is how many contracts teachers still think of it.

Moreover, if one distinguishes promissory estoppel as a substitute for consideration (as Williston viewed it) from promissory estoppel as a cause of action distinct from breach of contract (as the court viewed it in *Hoffman v. Red Owl Stores*,⁴⁹ which many contracts scholars once considered to be the harbinger of the future), then Hillman's results favor Williston's theory. To get enforcement a plaintiff needs a "promise + something." That "something" could be a bargain (consideration), or it could be detrimental reliance (promissory estoppel); but, the plaintiff needs a promise in any event, and what results is a *contract* that presumably must still satisfy other contractual requirements, such as definiteness or the Statute of Frauds.

As interesting as what Hillman finds among the cases he studied, however, is what he may have missed — and why he might have missed it. Hillman looked only for discussions of reliance to show that, contrary to the "new consensus," its presence is essential to promissory estoppel actions. But the problem for advocates of a "reliance theory" of promissory estoppel has always been distinguishing reasonable, justified, or foreseeable reliance from unreasonable, unjustified, or unforeseeable reliance, for no contracts theorist thinks that any and all detrimental reliance justifies a promissory estoppel claim.⁵⁰ In other words, in addition to a promise, the plaintiff needs "reliance + something" to get a recovery under any reliance theory of promissory estoppel. Whatever that "some-

48. For a summary of the previous wisdom, see Barnett, *supra* note 42, at 518-22.

49. 133 N.W.2d 267 (Wis. 1965).

50. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (referring to a "promise which the promisor should reasonably expect to induce" reliance by the promisee).

thing” is, it cannot be reliance, which is present in any event. Thus, all reliance theories of promissory estoppel require appeal to some factor apart from reliance to distinguish enforceable promises (which are accompanied by reliance) from unenforceable ones, and this is an element that reliance theorists have been unsuccessful in identifying.

For this reason, it would have been helpful if Hillman had examined the cases in which the presence or absence of reliance was discussed, not only to “question[] the ‘new consensus’ on promissory estoppel,”⁵¹ but also to see if he could discern the qualities other than reliance that made reliance sufficient or insufficient. This would have required Hillman to be more sensitive to the nuances of contract theory than he appears to be when he claims in *The Richness of Contract Law* that “[t]he theoretical debate therefore diverts the focus from the reality that promissory and non-promissory principles share the contract law spotlight, and *that is all we can and need to know.*” (pp. 7-8). If that is all we *can* know so be it, but it is hardly all we *need* to know.

Fortunately and coincidentally, at the time Hillman was conducting his research, another contracts scholar, Sidney DeLong, was conducting a very similar survey of decided promissory estoppel cases. In his article, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*,⁵² DeLong surveys “all of the promissory estoppel cases reported in 1995 and 1996.”⁵³ On this basis he, like Hillman, also takes issue with part of the “death of reliance” thesis I earlier presented.⁵⁴

In particular, he confirms Hillman’s principal finding that the presence of reliance is indeed a requirement of promissory estoppel: “A legion of unhappy plaintiffs can bear witness to the continued vitality of the actual reliance requirement, having discovered that a commercial promise is not alone sufficient to ground a claim under Section 90.”⁵⁵ He also confirms Hillman’s claim that *both* reliance and a promise are needed to sustain an action for promissory estoppel: “It is true that in many cases, opinions affirming the

51. Hillman, *supra* note 44.

52. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943.

53. *Id.* at 948.

54. His data “moderately” confirm the claim that the expectation interest, not the reliance interest, is the normal measure of recovery in contracts cases. *See id.* at 979-81. Hillman’s data too undercut any claim that the reliance interest is the prevailing measure of damages in promissory estoppel cases. The expectation interest is regularly awarded. *See Hillman, supra* note 44, at 601.

55. DeLong, *supra* note 52, at 981; *see also id.* at 984 (“Every single opinion that mentioned the matter instead affirmed the Restatement requirement that the plaintiff actually rely Considered as a group, these holdings lay to rest Farber and Matheson’s assessment that actual reliance is no longer an element of a claim of promissory estoppel.”).

necessity for reliance element also involved some other missing element. The most common defect was the absence of a clear and distinct promise"⁵⁶ And he takes issue with my claim that a manifested intention to be legally bound should be sufficient for contractual enforcement even in the absence of a bargain or detrimental reliance.⁵⁷

DeLong's objective was not, however, simply to debunk the "new consensus" on promissory estoppel but also to refine existing general theories so as to understand better when reliance was sufficient to justify the enforcement of a promise and when it was insufficient. What he finds is intriguing: Courts appear to make a distinction between what DeLong terms "performance reliance" and "enforcement reliance." With performance reliance, the "promisee relies solely on her estimate of the likelihood that the promisor will perform, without any expectation of a legal remedy if the reliance is disappointed."⁵⁸ With enforcement reliance, the "promisee relies both on the credibility of the promise and on the belief that she will have a legal remedy for some or all of the costs of disappointed reliance if the promise is not performed."⁵⁹ While not claiming the existence of a judicial consensus on the matter, he does notice the following:

Many of the opinions reported in 1995 and 1996 lend support to the thesis that, in order to prevail on a promissory estoppel claim, a commercial promisee must now demonstrate not only that her reliance was reasonable in light of the likelihood that the promisor would perform [that is, performance reliance], but also that she had a reasonable belief that the promise was legally enforceable when made [that is, enforcement reliance]. Excluding those promises that are already enforceable under bargain contract theory, this requires that the promisor manifest an affirmative intention that the promise be en-

56. *Id.* at 985-86 (footnote omitted). This passage continues: "Many of the 1995-96 cases, however, denied promissory estoppel claims on the *sole* ground that plaintiff had not demonstrated actual, detrimental reliance. The absence of actual reliance was decidedly determinative, not merely make-weight, in these cases." *Id.* at 986-87 (footnote omitted).

57. For Barnett, . . . the Section 90 promise becomes binding when it is made, regardless of the presence or absence of subsequent reliance by the promisee. Because he contends that actual reliance should be unnecessary to enforceability under Section 90, Barnett's consent theory cannot account for the courts' continuing insistence on actual reliance and their refusal to enforce non-bargain promises in its absence.

Id. at 995. But later, DeLong himself provides a possible answer to this challenge:

[U]nder Barnett's analysis a person who manifests an intention to be legally bound to perform a promise might also expressly or implicitly condition the promisee's power to enforce the promise on her actual reliance, or might expressly or implicitly reserve a power to rescind the promise at any time before such reliance.

Id. at 1000.

58. *Id.* at 953. The passage continues: "The promisee decides whether and how much to rely by assessing the promisor's honesty and reliability, the circumstances bearing on the probability of performance and breach, the benefits that reliance followed by performance would confer, and the costs that disappointed reliance would impose." *Id.*

59. *Id.*

forceable at the time of the promise. As the promise and consent theorists insist, the ensuing reliance is reasonable because the promise is enforceable, not vice versa.⁶⁰

In sum, “the 1995-96 case sample contains several decisions suggesting that a manifestation of consent to be legally bound may be becoming essential to liability under Section 90.”⁶¹ Moreover some “decisions support what might be called the negative half of the consent theory of Section 90, which is both traditional and largely noncontroversial: one who expresses an intention not to be legally bound usually will not be.”⁶²

One way to demonstrate the richness of contract theory and its importance to understanding contract law, then, is simply to read both Hillman’s and DeLong’s articles and ask which tells one *more* about contract law. Of course, Hillman can always go back and reexamine his data to see if it confirms DeLong’s findings.⁶³ But this would only be to demonstrate that knowing “that promissory and nonpromissory principles share the contract law spotlight” (p. 8), was not all he needed to know to understand the richness of contract law.

Another way is to examine Hillman’s treatment of promissory estoppel in *The Richness of Contract Law*. The book contains none of the empirical information just discussed, but it is clear that Hillman disagreed with those who emphasized promise over reliance before he embarked upon his study. In his chapter “Theories of Promissory Estoppel: Reliance and Promise,” he takes issue with “promise theorists” — in particular, Farber & Matheson⁶⁴ and Yorio & Thel. He offers one interesting insight in response to Yorio & Thel’s claim that reliance theory cannot explain the courts’ insistence on the existence of a promise:⁶⁵ “But Section 90 focuses on promise-induced reliance because other theories, such as equitable estoppel and misrepresentation, already protect injured parties

60. *Id.* at 1003. The passage continues:

Although the promisor’s manifestation of intention to be bound is critical to these cases, the court’s focus is usually on the promisee’s actual or presumed understanding of that manifestation. Enforcement is denied if the court finds that the promisee was or should have been aware that the promise was not intended to create an enforceable obligation.

Id.

61. *Id.* at 994.

62. *Id.* at 995.

63. Hillman notes that “Professor Sydney W. DeLong’s impressive study of promissory estoppel cases was published too late to be discussed in this Article.” Hillman, *supra* note 44, at 581 n.3.

64. The article he criticizes is Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985).

65. See Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 161-62 (1991) (“[R]eliance theory does not explain why in Section 90 cases courts insist that there be a promise. If the basis of recovery were harm caused by the defendant’s conduct, it should not matter whether the conduct constituted a promise.” (footnote omitted)).

from conduct and statements inducing detrimental reliance. Promissory estoppel plugs the gap in liability by creating liability for promise-induced reliance” (p. 68). Mostly, however, he questions their interpretation of, or overgeneralization from, the cases they discuss — a critique that is considerably less persuasive, as a descriptive matter, than his later empirical study.

Hillman’s need for an enriched theory of promissory estoppel is most apparent whenever he moves beyond describing judicial decisions to make normative suggestions for how courts ought to treat cases. For example, when discussing the need to distinguish reliance that merits protection from that which does not — the critical stumbling block for reliance theories of promissory estoppel — he says: “Foreseeability of the reliance *seems a reasonable tool* for distinguishing detrimental reliance that should and should not be compensated” (p. 68; emphasis added). No reason for this intuition is provided. He says:

Courts *should* also consider a promisor’s good faith, for example, by taking into account the reasons for the broken promise. A court, *with some justification*, may want to punish a bad faith promisor by awarding expectation damages. Conversely, if a promisor acted in good faith and expectancy damages vastly exceed reliance damages, a court may choose the latter. [p. 76; emphases added, footnote omitted]

No justification for these recommendations is given. He says:

Courts *should* evaluate defenses to bargained-for contracts more fully, for example, before they subvert them by granting expectancy damages under promissory estoppel. A court *may* conclude that a defense has outlived its usefulness and therefore decide the case on bargain grounds. Alternatively, a court *may* validate a contract defense, but conclude that a promisee’s reliance also merits some relief. [pp. 75-76; emphases added]

No guidance is offered as to when courts ought to choose one alternative or the other.

To support any of these normative suggestions, Hillman’s concluding observation that “reliance theory creates a flexible, evolving, context-dependent obligation” (p. 77) is simply no substitute for a theory of promissory estoppel, such as that provided by Sydney DeLong. But it neatly captures the instincts of the “realist” generation of contracts scholars who preceded him.

CONCLUSION: THE BEST LAW SCHOOL SUBJECT

When I was considering how I would write this review, I had decided to begin by making the provocative, and not entirely serious, claim that contracts was the best subject in which to specialize as a law professor. First, there are the merits of contracts scholarship. The signal-to-noise ratio in the contracts literature is extraordinarily high. Contracts scholarship is of uniformly excellent

quality; I rarely fail to learn from any article on contract law I read, and contract law publications are not too numerous to keep up with. There is a lot of long-standing and intricate contract doctrine to understand and integrate, so doing contract theory is both hard and rewarding.

Probably because there are so few active contracts scholars at the most elite schools, contracts scholars seem to place a very low premium on the status or institutional affiliations of other contracts scholars.⁶⁶ Everyone with something to say gets a real hearing. Though it is harder to place a contract article in elite journals, this also means that contracts scholars are accustomed to finding and taking seriously excellent articles in less prestigious journals. Moreover, as the discourse chronicled above suggests, contracts scholars take each other's ideas very seriously — testing and probing them with vigor. And I think real progress is made over time as a result of this scholarly exchange.

Then there are the advantages of teaching contracts. Contracts is a basic first-year course so we get to teach students when they are at their most engaged. At many schools, contracts still run through a full year, so we can teach it in greater depth than any one-semester course. Contracts is a course that raises fundamental questions of both justice and efficiency. In addition to the great debates among legal titans — Langdell, Holmes, Williston, Corbin, Cohen, Fuller, Llewellyn, Gilmore, Farnsworth, Macneil, Atiyah, Simpson, Horowitz, Fried, and the list goes on and on — there is a wonderful history of contract law to learn and teach. And the contracts literature includes more than the usual number of articles about the real story behind the classic contracts cases.

To my great surprise, however, by the time I sat down to write the review, I found that I had been preempted by none other than Robert Hillman and Robert Summers in an essay entitled *The Best Law School Subject*,⁶⁷ in which they claim that “contract law is by far the best law school subject to teach and to learn.”⁶⁸ They ask:

What other subject contains such a wealth of theory, doctrine, and substantive reasoning? What other subject focuses so clearly on essential components of economic and other organization in our society,

66. One of the drawbacks to being a contracts scholar is that the more prestigious the law school, the less obligation there appears to be to hire contracts scholars to teach first-year contracts classes. The prejudice is that contracts is a course that “anyone can teach.” While this is too bad for anyone seeking to climb the ladder, it helps ensure that, among contracts scholars, one's reputation depends less on one's affiliation and more on one's writings than in most other subjects. Another drawback is that one rarely gets invited to speak at other law schools on contract law topics, as compared with, say, the Ninth Amendment.

67. Robert A. Hillman & Robert S. Summers, *The Best Law School Subject*, 21 SEATTLE U. L. REV. 735 (1998). This is a reply to a review of their casebook by Sydney DeLong. See Sydney W. DeLong, *An Agnostic's Bible*, 20 SEATTLE U. L. REV. 295 (1997) (book review).

68. Hillman & Summers, *supra* note 67, at 735.

namely private agreements and exchange transactions? What subject better exemplifies the power of general theory, the functions and limits of the common law, the rise of statutory law, the interaction of rights and remedy, and the role of various legal actors in our system (including transactors, lawyers in their various roles, judges, and lawmakers)?⁶⁹

Moreover they emphasize how much fun it is to teach contracts, in part perhaps because “students come to the subject with low expectations. Invariably they are more than pleasantly surprised to see how interesting and exciting it is to learn about what promises society legally enforces and why.”⁷⁰

On this issue, then, there is no generational conflict. And I would add that, despite our disagreements, having active scholars like Robert Hillman with whom to exchange proposals and criticisms makes doing contracts theory both a challenge and a joy.

69. *Id.* at 735 (footnote omitted). In his review, DeLong observes that Hillman and Summers’s casebook “offers no hope of rationalizing the[] different principles [of obligation] with each other or establishing authoritative ways of deciding cases when the principles come into conflict” and characterizes this as “both a strength and a weakness.” DeLong, *supra* note 67, at 307. Hillman and Summers respond that they never attempted “to resolve the conflicts among the theories in one grand revelation. Indeed, no one has yet formulated a satisfactory ‘unified field theory of civil obligation’ and we doubt that anyone ever will or could.” Hillman & Summers, *supra* note 67, at 737 (quoting DeLong).

70. Hillman & Summers, *supra* note 67, at 735.