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## Placid, Clear-Seeming Words: Some Realism about the New Formalism (With Particular Attention to Promissory Estoppel)

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# Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)

SIDNEY W. DELONG\*

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## I. INTRODUCTION

Karl Llewellyn launched his 1930s manifesto *Some Realism About Realism*<sup>1</sup> with a curiously mixed metaphor:

Ferment is abroad in the law. . . .

The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words—placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble.<sup>2</sup>

The muddy yeast was American legal realism, with its rejection of legal formalism and its embrace of what was to become modern instrumentalist policy analysis. In contract law, realists are credited the development of an impressive array of common law rules protecting reliance, chief among which is the doctrine of promissory estoppel set forth in section 90 of the *Restatement (Second) of Contracts*.<sup>3</sup> But the

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1. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1930–1931).

2. *Id.* at 1222. Such *nostalgie de la boue* was apparently common in Depression era legal scholarship. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 461 (1934) (“Life resists our attempts to subject it to rules; the muddy flow of Being sweeps contemptuously over the barriers of our Ought.”). It reemerged fifty years later. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (contrasting crystalline bright line rules with muddy standards in property law). “Ferment” was also a favorite Llewellynian trope connoting spontaneous progress. K.N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 379 (1937) (stating that courts must give “direction to the fermentation” created by the problem of the standing business relation).

3. RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). GRANT GILMORE, *THE DEATH OF CONTRACT* 74, 88–90 (1974); see Robert A. Hillman, “*Instinct with an Obligation*” and the “*Normative Ambiguity of Rhetorical Power*,” 56 OHIO ST. L.J. 775, 781 (1995) (stating that reliance protection is antiformalist).

The *Restatement* tempers formalism with reliance protection in several places. RESTATEMENT (SECOND) OF CONTRACTS §§ 89(c), 90 (1981) (overcoming the formalism of the doctrine of consideration); § 45 (unilateral contract) and § 87(2) (offertory estoppel) (overcoming the formalism of the rules of offer and acceptance); § 88(c)

realist wave in contract law is said to have crested. For several years, legal trendspotters have marked a retreat from realist jurisprudence in the law of contract. Variouslly termed the "new formalism,"<sup>4</sup> the "new conceptualism,"<sup>5</sup> the "new conservatism,"<sup>6</sup> or "anti-antiformalism,"<sup>7</sup> the trend is seen as a rejection of realist, context-sensitive standards of adjudication in favor of formalist rules implemented by a mechanical

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(guaranty estoppel), § 129 (specific performance after reliance on oral land contract), § 139 (reliance on contracts within the statute of frauds), and § 150 (reliance on oral modification) (overcoming the formalism of the statute of frauds). A host of other formalistic rules are conditioned or limited by references to reliance or a party's material change of position. *E.g.*, *id.* § 34(3) (stating that an action in reliance on an agreement whose terms are uncertain may make a remedy appropriate). Reliance is protected through the *Restatement's* reference to the inducing of action or forbearance. *Id.* § 94(c) (reliance on a stipulation); § 273 (manifesting assent to discharge of contract induces action or forbearance); § 332(4) (revocability of gratuitous assignment). Reliance is protected by name in § 84(2)(b) (material change of position on promise to perform despite non-occurrence of a condition); § 230 (material change of position on occurrence of condition subsequent); § 256 (retraction of repudiation after material change in position in reliance); § 323(2) (reliance on obligor's assent to assignment or obligee's assent to delegation). Reliance is protected, though not by name, in §§ 341(2) and 342(b). *See also id.* § 247 (stating effect of acceptance of part performance creating belief that a condition will be waived).

4. Ian Ayres, *Eroding Entitlements as Litigation Commitment*, 66 U. CHI. L. REV. 836 (1999); Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781 (1999); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*]; Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) [hereinafter Bernstein, *Preliminary Study*]; David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Richard A. Epstein, *Confusion About Custom: Disentangling Informal Customs from Standard Contractual Provisions*, 66 U. CHI. L. REV. 821 (1999); Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 254 (1995); *Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527, 710-859 (1999) (neo-formalism in commercial law).

The "new" formalism has been a topic of conversation for about the last thirty-five years. GILMORE, *supra* note 3, at 102-03; ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 160-71 (1997) [hereinafter HILLMAN, *THE RICHNESS OF CONTRACT LAW*]; Robert A. Hillman, *The Triumph of Gilmore's The Death of Contract*, 90 NW. U. L. REV. 32, 42 (1995). Hillman identifies such diverse "neo-formalists" in contract law as himself, Louis Kaplow, Richard Epstein, Mary Becker, and Arthur Leff, in works dating back to 1967. HILLMAN, *THE RICHNESS OF CONTRACT LAW*, at 125-28.

5. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995).

6. Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879, 879-80 (1999).

7. Charny, *supra* note 4, at 842 (explaining that anti-antiformalism seeks to refute the claim that commercial law should be founded in immanent commercial practice and to refuse legal enforcement of commercial customs).

jurisprudence. Critics associate the doctrinal shift with a corresponding rejection of “interventionist, egalitarian” policy in favor of laissez faire faith in unregulated market exchange.<sup>8</sup> Analysts have sought explanations for the trend in the dynamics of national politics or the laws of historical oscillations.<sup>9</sup>

Most academic criticism has concentrated on neoformalist rules about the content of contractual obligation in the application of such doctrines as the parol evidence rule, the obligation of good faith, and the effects of trade usage. This Article examines the phenomenon as it arises in the creation of contract obligation, an area in which the virtues of formalism are arguably more important.<sup>10</sup> The developing law of promissory estoppel does indeed appear to display a trend away from reliance protection in the commercial world.<sup>11</sup> Many of these decisions may fairly be characterized as “formalist” insofar as they privilege textual forms (written contracts) over other contextual features. This Article argues, however, that this trend is more accurately characterized as a realist effort than a formalist or conceptualist one. While the label applied to the practice may appear to be unimportant, the term “formalism” tends both to obscure the policy-oriented way in which courts have manipulated legal doctrine and to minimize the role of private enterprise in the development of rules that privilege textual forms. For, as in Llewellyn’s era, it has not been the law of schools but practice that has brought about the change: the practice of well-

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8. Mooney, *supra* note 5, at 1133. Professor Mooney refers to the judiciary’s receptivity to formalist arguments and its related retrenchment from progressive contract principles as a “new conceptualism.” *Id.*

Just as Grant Gilmore predicted, the “Easter-tide” of the 1980s and early 90s resurrected many of the conceptualist abstractions of classical contract law. . . . [Such] courts have substantially abandoned the interventionist, egalitarian contract jurisprudence of the 1960s and 70s, substituting a far more classical, conceptualist ethic emphasizing once again “freedom of contract” and marketplace economics.

*Id.* Gilmore seems to have agreed with both the diagnosis and the “new conceptualist” term. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 107–08 (1977).

9. See Hillman, *supra* note 6, at 883–88; discussion, *supra* note 8.

10. HILLMAN, *THE RICHNESS OF CONTRACT LAW*, *supra* note 4, at 168; ERIC A. POSNER, *LAW AND SOCIAL NORMS* 156–61 (2000) (suggesting that merchants may deem courts to be more competent to determine the existence of contractual commitment—from the presence or absence of legal formalities—than to determine the precise content of contract terms or the existence of breach).

11. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 943; Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580 (1998) [hereinafter Hillman, *Questioning*]; Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 2–3 (1999) [hereinafter Hillman, *Unfulfilled Promise*].

counseled merchants and the judges who listened to them.<sup>12</sup>

This Article makes several points about promissory estoppel in the commercial world: (1) merchants generally seek to avoid reliance-based liability and to confine their legal obligation to express contracts; (2) to avoid the risk of section 90 liability, merchants have adopted, and the courts have validated, a formalist/textual strategy using preemptive disclaimers to block reliance-based claims; (3) by scrutinizing the “reasonableness” of the promisee’s reliance, modern courts are increasingly prone to deny commercial parties the benefit of reliance-protecting doctrines in an effort to channel them toward the exclusive use of formalized contracts; and (4) merchants have begun to procure statutory barriers to provide additional security against certain types of section 90 claims. Propelled by the most “realist” of motives, the “new formalism” promises to erase liability for promissory estoppel from the commercial landscape.

## II. THE MERCHANT FORMALIST COUNTERATTACK ON SECTION 90

The evolution of the law of reliance-based obligation is periodically hailed as the crowning achievement of twentieth century American common law.<sup>13</sup> If so, then the doctrine of promissory estoppel is the jewel in the crown. To some, the official recognition of promissory estoppel in section 90 of the *Restatement (Second) of Contracts*<sup>14</sup> promised an escape from the formal restrictions of the consideration doctrine then lodged in section 75.<sup>15</sup> Early decisions anticipated a radical

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12. “Contract behavior, not contract doctrine, came first, and contract law responded, first through judicial decisions and later through codes.” Speidel, *supra* note 4, at 257. “This is a first principle of American Legal Realism.” *Id.* at n.15.

13. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 678 (1984) (“One of the most significant developments in contract law in the past half-century has been the rise of promissory estoppel. . .”); Hillman, *Unfulfilled Promise*, *supra* note 11, at 2; Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) (stating that Section 90’s principle has become “perhaps the most radical and expansive development of this century in the law of promissory liability”).

14. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

15. GILMORE, *supra* note 3, at 72 (stating that by the time of the *Restatement (Second)*, the principle of section 90 had “swallowed up the bargain principle of § 75”). The bargain principle currently resides in section 71 of the *Restatement (Second)*. See Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 353, 355 (1969) (noting *inter alia* the frequency with which section 90 is invoked in commercial cases).

expansion of promissory obligation under the new doctrine.<sup>16</sup> Yet the litigation history of the last sixty years has witnessed a successful, counterrevolutionary effort by institutional promisors to avoid liability for promissory estoppel,<sup>17</sup> so that today only the most legally naïve promisor risks liability under section 90.

Textual formalism and realism each supply elements of the contemporary judicial blockade of section 90. As formalists, most courts insist upon a promise of the correct form and give effect to formal disclaimers of liability; as realists, they employ normative and consequentialist reasoning when analyzing reliance, insisting that a plaintiff exhibit behavior that comports with the court's view of best commercial practices. Realist policy reasoning seems paramount in the explicit insistence by some of the "new formalist" courts that sophisticated commercial parties formalize all their legal obligations and entitlements.

### A. A Fuller Consideration of Form

To describe the "new formalism" requires some clarification of the several related ideas in jurisprudence that go by the name "formalism." At a relatively high level of abstraction, formalism refers to an alleged philosophical view of law as being in its essence autonomous, objective, complete, coherent, and deductive.<sup>18</sup> As a mode of adjudication, formalism refers to a judicial tendency to apply existing legal rules literally, mechanically, and without reference to their purposes or to public policy.<sup>19</sup> Neither of these two versions of formalism is the sort

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16. DeLong, *supra* note 11, at 944.

17. *Id.* at 945; Hillman, *Questioning*, *supra* note 11 (reporting low success rates of plaintiffs in promissory estoppel case reports).

18. ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 136–59 (1982); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999).

To the classical formalists, law meant . . . a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.

*Id.* To Stanley Fish, formalism implies that "once a question has been posed as a *legal* question—has been put into the proper *form*—the answer to it will be generated by relations of entailment between that form and other forms in the system." STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 143 (1994). This Article will not attempt to characterize the vast scholarly literature on the nature of formalism. Numerous other definitions of formalism can be found in *Symposium*, *supra* note 4. Whether anyone has ever actually subscribed fully to the more extreme versions of formalism is doubtful.

19. Cass Sunstein describes formalism as a strategy of statutory interpretation as

referred to as the “new formalism” of contract adjudication; indeed, the new formalism conflicts with both these ideas.

As an attribute of particular substantive law, and particularly the law of contract, formalism can also mean “textualism,” the tendency to make legal obligation depend upon express language occurring in specified circumstances. To a textualist, contract formation and content depend upon the performance of specific speech acts,<sup>20</sup> such as “offer,” “acceptance,” and “promise.” It is this sense of “formalism” as textualism that is enjoying a judicial vogue. But textualism is a strategy rather than a philosophy and as such is equally compatible with what is usually called “realism.”

Antiformalism, or “realism,” views law as a matter of purpose and policy.<sup>21</sup> As a general view of law, realism is instrumentalism,<sup>22</sup> law

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follows:

[F]ormalist strategies . . . entail three commitments: to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases. Thus understood, formalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases. Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law. It tends as well to favor judicial holdings that take the form of wide rules rather than narrow settlements of particular disputes.

Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999). See also Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89 (1995) (stating that the formalist impulse includes a search for certainty, clarity, consistency, and stability; formalist methods include textualism and originalism).

20. An illocutionary speech act is a conventional action, such as “promising” that is performed in part by speaking. On speech act theory, see generally *The William James Lectures*, in J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson ed., 1965); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

21. There is no single “opposite” of formalism. Gilmore attributed the anti-formalist revolution to “American Legal Realism.” GILMORE, *supra* note 8, at 74–81. Summers contrasts formalism with pragmatic instrumentalism. SUMMERS, *supra* note 18. Twining contrasts “formalism” (analytical jurisprudence) with “functionalism” (sociological jurisprudence). WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 8 (1973). For Judge Posner, antiformalism is “realism,” which means “deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis.” Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986). Mooney emphasizes the political dimension, opposing both formalism and “conceptualism” to “progressivism.” Mooney, *supra* note 5, at 1131–35. Feinman and



understood as a means to an end instead of an autonomous complex of norms governed by its own internal logic.<sup>23</sup> As a mode of adjudication, realism is a tendency to make legal consequences turn on the court's view of the social policies relevant to legal enforcement and of the anticipated effects that different rules will produce. Casting its eye more broadly than does formalism, realist adjudication introduces more uncertainties: fewer cases are resolved on summary judgment. In return, it promises to provide more protection against unintended consequences and a closer fit between legal purposes and legal effects. Most importantly, because it focuses on the consequences of enforcement and the social policies it would serve, realist analysis is more openly normative than is formalist analysis.

It would appear at first that such realist adjudication would be less concerned with specific texts and speech acts than is formalist adjudication. Although the realist judge considers the parties' language to be relevant, she also looks at a more complete description of their behavior and is prepared to permit the creation, modification, and discharge of legal obligation by means other than formal language or convention. Nevertheless, a realist judge might ultimately decide to adopt textualism in a particular category of cases if she decided that textualism would serve policy better than a different rule. Once this decision has been made, her subsequent opinions may appear to be purely formalist. This appears to be the case with the "new formalism" in contract adjudication.

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others describe anti-formalism as "instrumentalism, a method in which judges overtly consider social policy and the social impact of their decisions." Feinman, *supra* note 13, at 682 n.21; Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 119–20 (1985). Cass Sunstein notes:

There is certainly no canonical form of antiformalism, and those who reject formalism can offer many different competing approaches. But the antiformalist tends to insist that interpretation requires or permits resort to sources other than the text, and the antiformalist tends as well to support judgments that take the form of narrow rather than wide holdings. The antiformalist is less worried about the exercise of discretion in individual cases and is more concerned about avoiding the kinds of rigidity that can lead to injustices and mistakes. Thus the antiformalist might contend that courts legitimately invoke purposes, or background principles of various kinds, to push statutes (or contracts) in what seem to be sensible directions. There is obviously a relationship between the debate over formalism and the debate over rules and standards . . . .

Sunstein, *supra* note 19, at 639.

22. For a fuller description of instrumentalism, see SUMMERS, *supra* note 18, at 20, 53.

23. In this sense, the orientation of normative law and economics analysis is "realist," although positive economic analysis of law is an exercise of formalist, deductive logic. Posner, *supra* note 21, at 185 ("The modern exemplar of formalism in common law is the positive economic analysis of that law . . .").

Formalism and realism are not only competing general theories of law and judicial strategies. Legal doctrines can also be described as formalist or realist, depending on how they describe legally operative facts. In familiar terms, formalist doctrines are "rules" while realist doctrines are "standards."<sup>24</sup> For example, a formalist contract rule might make legal liability turn on the existence of a particular illocutionary speech act, such as a promise, offer, or acceptance,<sup>25</sup> or on the existence of a relatively concrete fact or event, such as a seal or a signed writing. A realist contract rule might make liability turn instead on findings of reasonableness or justice or on a balancing of factors or interests. Moreover, the texts of legal doctrines or statutes may expressly seek to prevent or to require courts to pursue formalist or realist modes of adjudication.<sup>26</sup> A "rule" may prohibit a court from considering purpose or context, as does the parol evidence rule. Conversely, a "standard" may require a court to consider purpose or context or justice or reasonableness, as does the doctrine of unconscionability.

Textual formalism thus can serve nonformalist virtues, such as utility or autonomy. A court's willingness to practice textual formalism facilitates what theorists have called "power-conferring rules,"<sup>27</sup> laws

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24. Hillman, *supra* note 3, at 781; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992). Rules are "an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator." *Id.* Rules therefore confine the decisionmaker to a range of preestablished elements. *Id.* at 589. Standards, on the other hand, "entail leaving both specification of what conduct is permissible and factual issues for the adjudicator." *Id.* at 560. See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) ("The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.").

25. For example, "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." *Hotchkiss v. Nat'l City Bank of New York*, 200 F.287, 293 (S.D.N.Y. 1911).

26. See Feinman, *supra* note 13, at 697. "Under the formal approach epitomized by the first *Restatement*, the form of the doctrine and the method of applying it coalesced; by definition, doctrine stated as rules permitted and required mechanical application." *Id.* Feinman notes a change, however, in the *Restatement (Second)*: "The new style, however, presents a divergence of doctrine and method. Stating a standard is not equivalent to stating the method by which the standard will be implemented." *Id.*

27. H.L.A. HART, *THE CONCEPT OF LAW* 27-28 (2d ed. 1994) ("Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."). A legal power has been defined as the

that, by specifying formal prerequisites to legal rights and duties, serve as sets of directions that parties can follow in order to achieve predictable legal ends. Fuller and others likened such rules to channels or canals through which parties can arrive at desired destinations.<sup>28</sup> Legal forms also serve a closely related cautionary function, which is to warn a person that he is about to incur legal liability.

Fuller did not emphasize the converse of his channeling insight: legal forms can channel transactions away from legal consequences if appropriate forms are made available by the legal system. A typical utilitarian justification for textual formalism in contract law is the greater certainty it gives to those legal actors who are aware of the rules and can use them to structure their business/legal environment. Part of this assurance is the corresponding certainty that one can *avoid* legal liability, not only by avoiding the textual forms essential to obligation,<sup>29</sup> but by using forms that immunize the actor from obligation. The commercial bar has brought such new forms into existence and the courts have obliged by validating them in the ensuing cases.

### *B. The Form of Section 90: The Form of Promise*

The new formalism in commercial promissory estoppel adjudication can be seen in the continuing insistence that the reliance-inducing event be a “promise” in form, a formal speech act rather than the sum total of interactions that might convey reassurance to the hearer. Although there have been a few prominent exceptions, most contemporary courts seem to adhere to a strict formalism,<sup>30</sup> requiring not only a promise, but a

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ability to change a legal relation by bringing about operative facts that are under the volitional control of human beings. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44–45 (1913–1914). See also Kennedy, *supra* note 24, at 1739 (cataloguing the efficiency arguments that justify formalist rules); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941) (describing the channeling function of legal form).

28. Fuller, *supra* note 27, at 801–02. For a view that contract law is essentially a matter of form, see Robert S. Summers, *The Formal Character of Law—Criteria of Validity for Contracts*, 9 J. CONT. L. 29, 32 (1995) (“Formal criteria make room for choice, planning, and self-determination.”).

29. POSNER, *supra* note 10, at 161–63. Stanley Henderson earlier referred to the rules of contract formation as useful in enabling parties to “express, or to refuse to express, a willingness to be bound.” Henderson, *supra* note 15, at 357–58, 360.

30. The callousness of some contemporary formalist decisions invokes images of the Dickensian courts of the nineteenth century. *E.g.*, *Hart v. Windjammer Barefoot Cruises, Ltd.*, 632 N.Y.S.2d 100, 101 (App. Div. 1995) (denying plaintiff’s claim for breach of an oral contract involving the exchange of her services for a share of defendant’s corporate stock).

That plaintiff worked 20 years for defendants without any salary and without even asking what her share of the corporate stock would be or when she would receive it is not unequivocally referable to the alleged oral contract. Nor do

clear, distinct, unequivocal promise.<sup>31</sup> Language that might be taken as commitment, even language that would suffice to create bargain contract liability, will often be insufficient to count as a promise for section 90 purposes.<sup>32</sup>

That section 90 is applied with this degree of formalism is in some ways ironic. If Corbin was indeed concerned about the mechanical jurisprudence dispensed by formalist courts in the thrall of classical contract doctrine, then he was forced to use a singularly inapt tool to remedy the problem. He was obliged to undermine the formalism of classical contract law with a rule that was itself a form. In the hands of formalist judges, section 90 became a statute and the word "promise" in the official expression of the rule of promissory estoppel was given a literal and precise meaning.<sup>33</sup> As a result of this judicial formalism, if a

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her allegations that she resigned her position with another company in order to work for defendants support a claim of promissory estoppel. . . . [T]he alleged agreement to make plaintiff a "part of the Windjammer family" is too vague to be capable of enforcement . . . ."

*Id.* (internal citations omitted).

31. Keil v. Glacier Park, Inc., 614 P.2d 502, 506 (Mont. 1980) ("The terms of the promise must be certain, as there can be no promissory estoppel without a real promise."). A section 90 claimant must establish an express promise and not merely an implied one, because promissory estoppel would otherwise be "rendered meaningless." C & K Petroleum Prod., Inc. v. Equibank, 839 F.2d 188, 192 (3d Cir. 1988). In the absence of an express promise, a claim for promissory estoppel cannot be premised on defendant's words and actions during a course of dealing or performance. *Armstrong World Indus., Inc. v. Robert Levin Carpet Co.*, No. 98-CV-5884, 1999 U.S. Dist. LEXIS 7743, at \*24-25 (E.D. Pa. May 19, 1999). *But see Jackson Nat'l Life Ins. Co. v. Gofen & Glossberg, Inc.*, 882 F. Supp. 713, 724-25 (N.D. Ill. 1995); *First Nat'l Bank of Cicero v. Sylvester*, 554 N.E.2d 1063, 1070 (Ill. App. Ct. 1990) (stating that although a promise must be unambiguous in order for it to underlie a claim of promissory estoppel, it need not be express; it can be inferred from conduct and words). Hillman, *Questioning*, *supra* note 11, at 596; Hillman, *Unfulfilled Promise*, *supra* note 11, at 12-15.

32. DeLong, *supra* note 11, at 1003-07.

33. Opponents of the *Restatement* project foresaw this formalist risk.

The . . . [Restatement] is apparently the final answer that the Word alone counts, and the long and tortuous way by which the Word was ascertained is to be forgotten.

...

The process of statutory interpretation, though inevitable, is difficult and full of pitfalls . . . [R]estatement interpretation is an unreality.

ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* C-1 (3d ed. 1997) (citing Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 652, 654-55 (1933). *See also* Feinman, *supra* note 13, at 709 (stating that courts frequently apply promissory estoppel in a formalist way as a doctrine, consisting of the language of section 90); Harold C. Havighurst, *The Restatement of the Law of Contracts*, 27 ILL. L. REV. 910, 914-15 (1932-1933) (stating that the *Restatement* threatens the case method of analysis); Edwin

potential defendant uttered something short of a clear and distinct promise, then even if the hearer's reliance was clearly foreseeable (even if it was invited by the speaker) and even if the reliance occurred as expected and even if injustice would result in the absence of enforcement, nevertheless, enforcement would be denied on the sole ground that a "promise" had not been made. As a consequence, in most jurisdictions, one need not fear uttering a statement "instinct with an obligation" so long as it is "imperfectly expressed."<sup>34</sup>

### C. Disclaimers and Other Countertexts

To use Llewellyn's terms, the transformative flood of practice has been the widespread reaction of the commercial bar to promissory estoppel. In light of decisions such as *Hoffman v. Red Owl Stores, Inc.*<sup>35</sup> and *Feinberg v. Pfeiffer Co.*,<sup>36</sup> commercial parties' lawyers realized that section 90 posed a risk of a new form of liability to their clients, who were likely to make, or to be accused of making, nonbargain promises during the course of negotiating formal contracts or during their performance phases. For example, employers discuss terms of employment in prehiring conversations; lenders discuss loans before making formal loan commitments; franchisors discuss dealerships before formally signing franchise agreements; commercial lessors or lessees discuss lease terms before signing a lease; and corporations discuss the terms of a merger or acquisition before signing a formal agreement.

Recent studies of commercial behavior in various industries have suggested the reasons for merchants to be reluctant for these preliminary transactions to create legally enforceable obligations. Lisa Bernstein's research has shown that most merchants prefer the existence and content of their legally enforceable obligations to be determined by explicit textual provisions in written contracts rather than by custom or course of dealing.<sup>37</sup> Bernstein explains these empirical findings by a theory that,

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W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 399–400, 405 (1933) (doubting the ability to choose the single correct meaning of a body of precedent).

34. *Wood v. Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.). On the vicissitudes of Cardozo's "instinct" rhetoric as it has appeared in the courts, see Hillman, *supra* note 3, at 787–94.

35. 133 N.W.2d 267 (Wis. 1965).

36. 322 S.W.2d 163 (Mo. Ct. App. 1959).

37. Bernstein, *Preliminary Study*, *supra* note 4, at 717–46; Bernstein, *Merchant Law*, *supra* note 4, at 1765. Such merchants also prefer that courts apply formalist methods rather than realist methods when adjudicating trade disputes.

In deciding cases, the NGFA arbitrators take a formalistic approach to adjudication; they consistently refuse to look behind the letter of a trade rule to discern and take into account the type of behavior that the rule is intended to

for various reasons relating to efficiency, "rational transactors might deliberately leave aspects of their contracting relationship to be governed, in whole or in part, by extralegal commitments and sanctions."<sup>38</sup>

The same mercantile preference for explicit contract over less formal sources of legal obligation underlies the marketplace motive for the counterattack on promissory estoppel liability. Many well-counseled commercial parties met the threat of section 90 liability through the surprisingly simple tactic of disclaiming any intention to be legally bound by their promises.<sup>39</sup> Once a disclaimer of the appropriate form had been made, courts would usually refuse to find the promisor liable for any ensuing reliance.

To a court applying the formalized doctrine of section 90, a preemptory disclaimer might be seen to have three related effects, all tending to preclude enforcement for the promissory estoppel plaintiff: (1) the disclaimer might prevent the subsequent utterance from being interpreted as a "promise" because the disclaimer prevents it from being a commitment; (2) the disclaimer might render the reliance unreasonable and, therefore, legally unforeseeable; and (3) the disclaimer might make enforcement unnecessary to prevent injustice because a promisee who was warned of the promisor's intention not to incur legal liability would not be "unjustly" denied a remedy he had no right to expect. Each of these effects is "formal" in that it flows deductively from the "plain meaning" of the disclaimer's language. Each one will depend upon the exclusion of any inconsistent features of the transaction or relationship under consideration for its legal effect.

### 1. Embedded Disclaimers

What happens when, in the act of promising, a promisor says, "I'm not promising"? In *Spooner v. Reserve Life Ins. Co.*,<sup>40</sup> an insurance

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encourage or discourage.

....

... The NGFA tribunal does not permit unwritten customs and usages of trade to vary or qualify the meaning of either trade rules or explicit contractual provisions.

*Id.* at 1775, 1777.

38. *Id.* at 1788.

39. DeLong, *supra* note 11, at 1007. The phenomenon of disclaiming liability has been noted by others, e.g., POSNER, *supra* note 10, at 163; Rose, *supra* note 2, at 582.

40. 287 P.2d. 735 (Wash. 1955).

company announced to its agents a bonus program under which agents would receive a year-end bonus calculated by a formula based on the lapse ratio on policies they sold. The critical parts of the announcement were these:

Extra Earnings Agreement

....

Your Home Office folks are well aware . . . that you in the field must enjoy a sense of real security and see the road of the future stretching clearly ahead. Our association must be mutually profitable and pleasant. . . .

Now, in addition to present substantial commissions, we are announcing your Renewal Bonus Plan *which provides extra earnings*. . . .

Reserve wants *career* men—men who are as much concerned about *next year as next month*. To attract such workers, and inspire their best efforts, your Company now puts into effect a schedule of *Bonus Payments*.

Your *Renewal Bonus* earnings will depend upon the Quality of your business as well as the amount. If you do a good job, you will earn a substantial income. If you do an *outstanding* job, you will be *very handsomely* rewarded.

You will receive at the end of each 12 month period, a bonus in accordance with the following schedule:

....

This renewal bonus is a *voluntary* contribution on the part of the Company. It is agreed by you and by us that it may be withheld, increased, decreased or discontinued, individually or collectively, with or without notice. . . .

It will be paid once a year—on the mean amount of your business in force. . . . [D]uring the year the *boys are separated from the men*. The boys will get no bonus. That Leaves More For The Men.

In return, I ask only that you give me your best efforts. . . .

. . . [Y]our first Renewal Bonus check will be sent to you as quickly as humanly possible after the 12 months is up.

If you welcome these Extra Earnings, and I know you will, and to avoid any possible future misunderstanding, sign the enclosed copy of this agreement and hand it to your Manager who will send it to me.

....

C.C. Bradley [signed]<sup>41</sup>

The underlined disclaimer was unmarked in the original. Its deviant style and substance are apparent. It is sandwiched between statements that are unqualified commitments to make the described payments. As the company hoped, some of its agents (presumably the “Men”) achieved the lapse levels entitling them to bonuses. The company refused to pay. The agents argued that Reserve’s promise to pay bonuses was enforceable under section 90. Reserve countered that the disclaimer sentences made its promise illusory. The court agreed that Reserve had made only a “supposed promise” not a real one.<sup>42</sup> Even though the purpose of the “Extra Earnings Agreement” was to induce the agents’ “best efforts” by giving them “a sense of real security,” when

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41. *Id.* at 736–37 (underlined emphasis added).

42. “[B]efore this rule can be applied, there must be a real promise to be enforced. Action in reliance upon a supposed promise creates no obligation on an individual or corporation whose only promise is wholly illusory.” *Id.* at 738.

that reliance ensued, the court felt constrained to deny recovery under section 90 for lack of a real "promise." The court reluctantly concluded that the agents were relying on the "corporate conscience" of the company rather than upon an enforceable contract. The court held "[t]here is a natural aversion to such one-sided propositions, but we cannot delete terms or words from an offer, nor can we ignore them, to make a binding contract for the parties where none exists."<sup>43</sup>

The apologetic tone is characteristic of some textual formalist courts who claim to be bound by what they believe is a plain meaning. But the *Spooner* court had to do a lot of interpretive work in order to put itself in that helpless position. In giving controlling force to the disclaimer, the court ignored several time-honored ways to treat the inconsistency in Reserve's written announcement: (1) the announcement is ambiguous and should be construed against the drafter, Reserve, who created the ambiguity;<sup>44</sup> (2) the disclaimer should be given a meaning that is consistent with the express promises, for example, that the power to withhold the bonus ends after it is earned;<sup>45</sup> (3) the disclaimer should be deemed to have been superseded by the promises that followed it in the letter; and (4) the disclaimer should be deemed inoperative as a matter of law because it accompanied a promise.<sup>46</sup>

Despite its protestation that it had no power to "delete terms or words

43. *Id.*

44. The "proferentum" rule puts the risk of ambiguity on the drafter of the agreement. *E.g.*, *N. Gate Corp. v. Nat'l Food Stores, Inc.*, 140 N.W.2d 744, 747 (Wis. 1966).

45. The court engaged in such interpretation in the well-known case *Tilbert v. Eagle Lock Co.*, 165 A. 205 (Conn. 1933). An employer promised its employees death benefits in an announcement that stated that it "constitutes no contract" and "confers no legal rights." *Id.* at 207. Holding that the benefits promise became enforceable when the employee died before revocation, the court interpreted the announcement to permit revocation only prospectively, as to deaths occurring thereafter. *Id.*

To construe it as meaning, further, that, notwithstanding acceptance by an employee and compliance therewith, no obligation whatever was imposed upon the defendant, and that, without exercise of the reserved right of discontinuance or other action terminating the agreement, it might refuse to perform it, would ascribe to the defendant an intention to mislead its employees, to its advantage, by an inducement which was known and intended by it to be entirely nugatory, and which this record does not require us to attribute to it.

*Id.* at 207-08. *Accord Mabley & Carew Co. v. Borden*, 195 N.E. 697, 698-99 (Ohio 1935). *Hillman*, *supra* note 3, at 791-92, (discussing *Tymshare, Inc. v. Covell*, 727 F.2d 1145 (D.C. Cir. 1984)).

46. This is the approach taken by the Sales article of the Uniform Commercial Code on disclaimers of express warranty. U.C.C. § 2-316(1) (1962).



from an offer,” the court effectively deleted all the promises from the letter in order to give full force to the disclaimer. Like the grin on the Cheshire Cat, the disclaimer remained while everything else in the letter vanished. The decision to reject other ways of dealing with the contradiction does not flow from the pure form of the letter but from a tacit, realist view about how commercial messages of this sort should be dealt with by employers and employees.

## 2. *Preemptive Disclaimers*

While the embedded disclaimer works well in calculated inducements such as Reserve Insurance Company’s bonus plan, the potential section 90 defendant requires a more comprehensive protection, a sort of blanket disavowal that could nullify all other promises, whenever they were uttered. Creative lawyering has produced such disclaimers in a variety of precontractual contexts. Appellate reports of the last three decades contain a luxuriant proliferation of preemptive disclaimers<sup>47</sup>—letter of intent disclaimers,<sup>48</sup> homemade statutes of frauds,<sup>49</sup> no-oral-modification clauses,<sup>50</sup> employee handbook disclaimers,<sup>51</sup> and notices given to and/or signed by employees at the time of hiring<sup>52</sup>—all designed to render legally inoperable any subsequent promise or factual representation. These disclaimers are often unilateral and noncontractual, as when they are contained in attorney letters transmitting draft agreements.<sup>53</sup> Yet such disclaimers are usually given the full effect of contractual promises. After they are given, the parties can openly promise and make representations to each other, and the promisee has the risk of reliance.

## 3. *Postpromise Disclaimers*

In several cases, courts have given legal effect to disclaimers or other inconsistent language uttered after the promise was made. The most powerful version of a postpromise disclaimer is created by integrating an

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47. See also DeLong, *supra* note 11, at 1007–11.

48. E.g., *W.R. Grace & Co. v. Taco Tico Acquisition Corp.*, 454 S.E.2d 789, 791 (Ga. Ct. App. 1995).

49. E.g., *Puri v. Blockbuster Music Retail, Inc.*, No. 95-C-50018, 1995 U.S. Dist. LEXIS 18819, at \*13–14 (N.D. Ill. Dec. 20, 1995); DeLong, *supra* note 11, at 1009–10.

50. E.g., *Arlington Fin. Corp. v. Ben Franklin Bank of Ill.*, No. 98-C-7068, 1999 U.S. Dist. LEXIS 1690, at \*14–15 (N.D. Ill. Feb. 10, 1999).

51. DeLong, *supra* note 11, at 1011.

52. *Loghry v. Unicover Corp.*, 927 P.2d 706, 709–11 (Wyo. 1996) (stating that reliance on oral promise that employer would not terminate employee was unreasonable because employee had signed employee application providing that she was terminable at will and that no agent of the employer other than the president could make any agreement to the contrary).

53. See *Puri*, 1995 U.S. Dist. LEXIS 18819, at \*2, \*13–14.

agreement so as to bar evidence of the earlier promise under the parol evidence rule. Most courts hold that if the parties have executed a binding integrated agreement, it discharges any prior promises inconsistent with the agreement, and if the integration is intended to be a complete integration, it discharges any prior promises within the subject matter of the agreement.<sup>54</sup>

But the effect of inconsistent statements is not limited to integrated agreements. Any inconsistent statement made after a promise is made can jeopardize the reliance interest. Once a promise has been made, the postpromise disclaimer can bar liability if reliance has not yet occurred.<sup>55</sup>

#### *D. Formalist Interpretive Rules*

The acid test of a disclaimer is whether it will protect the disclaiming party from liability for a reliance-inducing promise. If a defendant has made both a disclaimer and a reliance-inducing promise, courts need some way to interpret the contradictory meaning of these two speech-acts. In order to give primacy to the disclaimer and defeat the relying promisee's claim, neoformalist courts often resort to interpretive conventions that conflict with the ways that inconsistent statements are understood in ordinary speech. The choice of these conventions is additional evidence of a normative commitment in the guise of a passive exercise in mechanical jurisprudence.

##### *I. Simultaneity and Contiguity*

Neoformalist interpretation of contract language presumes that the disclaimer and the alleged promise were uttered simultaneously by the

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54. *Res. Tech. Corp. v. Fisher Scientific Co.*, 924 P.2d 972, 976–77 (Wyo. 1996) (stating that as an alternative basis for the ruling the claim for promissory estoppel was barred by parol evidence rule where integrated agreement contradicted written promises made six days before execution of integration).

55. *Alden v. Presley*, 637 S.W.2d 862, 864–65 (Tenn. 1982) (holding that disavowal by estate of decedent's promise to pay off plaintiff's mortgage barred promissory estoppel claim when plaintiff subsequently relied on promise by assuming mortgage). *See also McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 39 (1st Cir. 1998) (finding reliance to be unreasonable as a matter of law "[w]here a written statement conflicts with an oral statement," because "Massachusetts law assumes that a reasonable person will investigate further"); *Coll v. PB Diagnostic Sys., Inc.*, 50 F.3d 1115, 1124 (1st Cir. 1995) (stating that when a promisee is faced with a conflict between an oral promise and a written statement, it is unreasonable as a matter of law to rely on the oral promise).

same author and were heard that way by the employee, even though the disclaimer and the promise or representation were separated widely in space, time, and circumstance. For example, the disclaimer may have been expressed in an employee handbook that was reviewed along with a stack of other forms in a personnel office. The promise may have been made years later on a job site by a supervisor in a conversation about the employee's performance.<sup>56</sup> Neoformalist contract interpretation implicitly assumes that the disclaimer was present to the employee's consciousness at all times after it was uttered. Courts convey the simultaneity rhetorically by juxtaposing the two statements in close proximity in the judicial opinion, where their inconsistency seems obvious.

## 2. *Nonrepeal*

In ordinary speech, a later statement is usually understood to supersede an earlier, inconsistent statement. Where the inconsistency is obvious to both the speaker and the hearer, the hearer will usually not demand that the speaker reconfirm the second statement, but will assume that it represents the speaker's current position. Thus, if the speaker first says, "I won't be making any appointments today," and later in the day says, "I promise to join you for lunch," the hearer will assume the speaker changed his mind about appointments. Neoformalist judges, however, indulge in the opposite presumption. A disclaimer will not be deemed to have been superseded by a subsequent statement of the sort disclaimed.

## 3. *Primacy of Disclaimer over Promise*

In neoformalist interpretation, where a speaker utters both a promise and a disclaimer in any sequence, the disclaimer always takes precedence over the promise.<sup>57</sup> This reverses the usual discourse convention of ordinary speech, in which committal trump noncommittal statements. Thus, when a promise is followed by a disclaimer, the

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56. *E.g.*, *Hatfield v. Bd. of County Comm'rs*, 52 F.3d 858, 865 (10th Cir. 1995); *Lincoln v. Wackenhut Corp.*, 867 P.2d 701, 703 (Wyo. 1994); *McIntosh v. Roadway Express, Inc.*, 640 N.E.2d 570, 571-72 (Ohio Ct. App. 1994) (finding two years between disclaimer and promise). See DeLong, *supra* note 11, at 975-76, 975 n.109.

57. See DeLong, *supra* note 11, at 1007-08. Earlier research showed a judicial tendency to overcome disclaimers when they are ambiguous. A review of cases during the eleven-year period from 1980 to 1991 found forty-one cases that failed to enforce handbook or job application disclaimers. Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *INDUST. REL. L.J.* 326, 382-85 (1991-1992). It is likely that formal defects identified in such decisions have been repaired by later employers.

disclaimer repeals the promise. When a promise is preceded or accompanied by a disclaimer, the disclaimer nullifies the promise.

### *E. The Utility of Disclaimers*

A realist approach to the disclaimer strategy is bottomed on the commercial value of the mechanism. The disclaimer looks different to the two parties. To the promisee, the disclaimer looks like an incantation that permits the speaker to indulge in a carnival of lies and contradictions without legal liability. It also seems to permit the speaker to opt out of a tort-based standard of conduct and to gain the freedom to abuse the trust and confidence that later develops as the parties continue to deal with each other.

To the promisor, however, the disclaimer opens a space for informal negotiation and speech in which the speaker can avoid being trapped into unintentional legal commitment or being made responsible for unbargained-for reliance. The employment handbook disclaimer theoretically prevents misunderstandings about who has power to bind the speaker and about what kinds of legal obligations the speaker is willing to undertake. These effects reduce the costs associated with legal risks, and so facilitate negotiation and the creation of useful enforceable relationships. As Stanley Henderson observed, preservation of this precontractual freedom to “express, or to refuse to express, a willingness to be bound” is an objective of the rules of contract formation, such as offer and acceptance.<sup>58</sup> Disclaimers prevent reliance principles from limiting this freedom.

Even after the conclusion of precontractual negotiations, disclaimers operate to prevent legal obligation from arising within the course of an ongoing business relationship. Bernstein has shown that the unenforceable promise is a common feature of mercantile life.<sup>59</sup> She has also suggested why rational merchants would desire significant parts of their commercial relationships to consist of unenforceable obligations subject to nonlegal sanctions.<sup>60</sup> Bernstein concluded that most merchants prefer to have their business relations governed by a dual set of norms: legally unenforceable “relationship-preserving norms” and legally enforceable “end-game norms” to regulate the termination of the

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58. Henderson, *supra* note 15, at 357–58, 360.

59. Bernstein, *Merchant Law*, *supra* note 4, at 1808–09.

60. *Id.* at 1788–89.

relationship.<sup>61</sup> She has made a persuasive argument that courts should not enforce commitments that merchants do not obviously intend to create legal obligations, and that doing so would have negative effects on commerce.<sup>62</sup>

Bernstein's analysis is, however, derived primarily from merchant trade associations in which most parties can be assumed to understand which commitments are legally enforceable and which are not.<sup>63</sup> Extending the principle of unenforceable obligation to relationships between merchants and nonmerchants requires more justification. The unenforceable promise is problematic when made to someone—an employee, a consumer, an insured—who does not understand the effect of the disclaimer.<sup>64</sup> For example, Pauline Kim's research has shown that employees persistently believe that they can be terminated only for cause despite being informed in employee handbooks and otherwise that they are at-will.<sup>65</sup> Others have found that employees may feel that they have a "psychological contract" depending on its use of certain kinds of language.<sup>66</sup>

Bernstein theorizes that, like merchant buyers, consumer buyers may prefer to rely on unenforceable "relationship-preserving norms" instead of enforceable "end-game norms," but for different reasons.<sup>67</sup> Legal enforceability may have little value to a consumer. In the absence of personal injury, the amount in controversy for breach of a consumer contract generally does not justify the expense of legal redress even when entitlement is clear. Under these circumstances, most consumers must rely on unenforceable norms. It would be irrational for them to pay an increased product price in order to obtain enforceable rights.<sup>68</sup> Todd Rakoff has also suggested that consumers commonly rely on the sellers' reputation to fulfill obligations that are legally disclaimed in the standardized form contracts.<sup>69</sup>

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61. *Id.* at 1796.

62. *Id.* at 1794–95. See also *Symposium*, *supra* note 4. Other theorists have questioned the wisdom or efficiency of legal enforcement of commercial customs, even assuming they could be proved with sufficient certainty. POSNER, *supra* note 10, at 156–61.

63. Bernstein, *Merchant Law*, *supra* note 4, at 1769–79.

64. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–46 (1997).

65. *Id.*

66. Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647, 676–77 (1994).

67. Bernstein, *Merchant Law*, *supra* 4, at 1790–91 (referring to "shrink-wrap" warranty disclaimers in computer software).

68. *Id.*

69. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96

### III. NEO-REALIST CHANNEL CHANGING, OR "WHAT IS THE SCOLDING OF THAT CASE?"

It is a curious rhetorical feature of opinions that deal with claims of contract and related forms of obligation that the courts frequently interrupt their rulings to scold the losing party for behaving imprudently or incautiously.<sup>70</sup> Typical chiding messages are, "Don't blame us; you should have protected yourself"; "You were imprudent to trust your adversary"; "You should have gotten his promise in writing"; "It was foolish for you to sign without reading the document"; and "If that's what you meant, you should have expressed it in the contract." This pedagogical note is absent from the typical opinion in other common law or statutory fields and suggests that contract opinions are intended not only to justify the decision but to educate the litigants.

Like their predecessors, some of the new formalist courts have been quick to seize any opportunity to chastise losing parties for failing to read agreements before signing or failing to get critical promises in writing. If anything is new about these decisions, it is a more candid admission that the court will deny recovery solely to steer parties into formalist channels when creating an obligation for reasons that have more to do with judicial economy than with the doctrinal requirements of reliance-protecting rules. The effect of this steering is that the doctrines of misrepresentation and promissory estoppel are deforming in ways that will make them less available to commercial parties. This is classic realism.

In *Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*,<sup>71</sup> Thatcher, a pharmacy, was considering a renewal of its lease on space in a shopping center.<sup>72</sup> The lease contained a

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HARV. L. REV. 1173, 1226-29 (1983).

70. Examples could be multiplied endlessly. Some classics include *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 345-46 (2d Cir. 1933) (finding that the subcontractor could have, but did not, require acceptance of its offer by general contractor); *Stees v. Leonard*, 20 Minn. 448, 451 (1874) (justifying requiring enforcement of contracts in harsh cases because the promisor "has improvidently assumed an absolute, when he might have undertaken only a qualified, liability"); *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (stating that the owner could have secured the right to perfect performance "by apt and certain words"); *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 114 (Okla. 1963) (finding that the owner should have specifically negotiated for defendant's undertaking to restore strip mined property).

71. 636 A.2d 156 (Pa. 1994).

72. *Id.* at 157.

promise by the landlord not to lease to another pharmacy, but excepted a supermarket also located in the shopping center.<sup>73</sup> Concerned about potential competition from the supermarket, Thatcher prepared to relocate. But when the landlord and the supermarket each orally assured Thatcher that the supermarket would not open a competing pharmacy,<sup>74</sup> Thatcher renewed its lease for 10 years. The supermarket later made plans to open a pharmacy and Thatcher sued to enjoin the opening.<sup>75</sup>

The trial court entered the injunction on a theory of promissory estoppel.<sup>76</sup> The Pennsylvania Supreme Court reversed on the basis that enforcement of the promise was not necessary to avoid injustice.<sup>77</sup> First, the court found Thatcher's reliance on the supermarket's oral promise to have been unreasonable.<sup>78</sup> The language of the lease agreement reserved the supermarket's right to operate a pharmacy, and Thatcher had a history of "less than amicable" relations with the supermarket.<sup>79</sup>

In view of the relationship between the parties and the nature and duration of the promise, any agreement not to compete should have been formalized. Proceeding in such a manner would have memorialized the occasion and reduced the possibility that the terms of the agreement would be misunderstood. As a business entity operating in the commercial setting, Thatcher's showed poor judgment when it decided to renew its ten-year lease and forgo its opportunity to relocate on the basis of an indefinitely worded promise uttered in an informal conversation with a potential competitor.<sup>80</sup>

The court also based its decision on the informality with which the promise was made.<sup>81</sup> Finally, the court held that the absence of a written agreement "prevented critical evidentiary, cautionary, and deterrent functions from being performed."<sup>82</sup> Thus, the court held that because the

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73. *Id.*

74. *Id.* at 159–60.

75. *Id.* at 157.

76. *Id.*

77. *Id.* at 161.

78. *Id.* at 160.

79. *Id.*

80. *Id.* at 160–61.

81. The court stated:

[The oral promise] fails to reflect the degree of formality one would expect when business rivals operating in a commercial setting have rights at stake as important as the freedom to enter a new line of business and the choice of where to locate for a ten-year period of time. Despite the gravity of these matters, the record fails to reveal that the parties even so much as shook hands to formalize their agreement.

*Id.* at 161.

82. *Id.* The court quoted the following passage from the *Restatement (Second)*:

[S]atisfaction of [this] requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to

formalities of an express contract were missing, enforcement of the oral promise was not necessary to prevent injustice. While the majority emphasized Thatcher's lack of enforcement reliance, however, the dissenting opinion emphasized the reasonableness of its performance reliance in light of the promisor's history of performing its promises.<sup>83</sup>

*Thatcher* exemplifies the scolding tone of the new formalism in the courts. The court complains that the plaintiff was too trusting and used "poor judgment" in relying on the oral assurances of a rival. The *Thatcher* court sends a message: failing to formalize an important business agreement may alone be sufficient reason to deny reliance protection.<sup>84</sup>

Courts practicing the new formalism in contract law often express an intention to steer commercial actors into the path of express contracts and away from relations whose obligations are defined by tort law, such as misrepresentation. In *Lazard Freres & Co. v. Protective Life Insurance Co.*,<sup>85</sup> an institutional seller sued a sophisticated buyer for breach of a contract to purchase \$10 million in bank debt.<sup>86</sup> The contract had been made by telephone, then confirmed in writing several days later subject to preparation of final documentation and closing.<sup>87</sup> Buyer refused to negotiate and execute the final closing documents.<sup>88</sup>

which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

*Id.* at 160 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b).

83. Justice Papadakos, in his dissent, stated:

The trial court also found that Mr. Zukin [Thatcher] knew from his prior dealings that Mr. Greenblatt [the supermarket] had previously (in 1976) honored his promise to stop plans to open a pharmacy if Thatcher would not sell milk by removing signs announcing the opening of a pharmacy; and that Mr. Zukin knew, based on his knowledge of the supermarket layout and the terms of its lease, that the supermarket was at or near its maximum level of available selling space for non-food items. Under these circumstances, it was reasonable for Thatcher to believe that Consolidated would honor its oral promise not to compete and to act in reliance thereon.

*Id.* at 164 (Papadakos, J., dissenting).

84. *Thatcher* was applied to an oral employment agreement in *Marmer v. Saloom Furniture Co., Inc.*, No. 94-6869, 1995 U.S. Dist. LEXIS 13733, at \*19-21 (E.D. Pa. Sept. 12, 1995). The court held that a commission sales agent's reliance on an oral promise of five-year employment was unreasonable where he did not get the promise in writing and did not "confirm" its terms, the promise was made in a relatively informal meeting, no hands were shaken, and five-year contracts were rare. *Id.*

85. 108 F.3d 1531 (2d Cir. 1997).

86. *Id.* at 1534.

87. *Id.*

88. *Id.* at 1535.



Buyer raised an affirmative defense of fraud, alleging that in the original conversation, seller orally misrepresented the dates on which the issuer of the debt was certain to pay it.<sup>89</sup> After the buyer orally agreed to purchase the debt, the seller sent the buyer a written confirmation and a copy of a report that contradicted the oral representation and gave the actual repayment dates.<sup>90</sup> Without reading the report, the buyer signed the confirmation.<sup>91</sup> When it later learned the truth, it refused to perform by executing the final contractual agreement.<sup>92</sup>

The district court granted summary judgment to the seller on grounds that the buyer was not justified in relying on the seller's oral characterization of the contents of the report that the buyer had in its possession.<sup>93</sup> The Second Circuit, in an opinion by Judge Calabresi, refused to affirm on this ground, however, because of evidence that the parties considered themselves to have been legally bound by the telephone conversation, before the buyer received the report.<sup>94</sup> Thus, whether the buyer's reliance on the oral representation was justifiable was to be determined as of that earlier date. Citing the need for speedy acceptance of the seller's offer, the appellate court was unwilling to hold that reliance on oral representations in such a large transaction was unjustifiable as a matter of law merely because the parties were both sophisticated.<sup>95</sup>

However, both the oral and written agreements contained a customary term conditioning closing upon the preparation, review, and execution of documentation acceptable to both Lazard and Protective prior to closing.<sup>96</sup> The Court of Appeals held that if the buyer failed to condition its duty to close on the truthfulness of the seller's representations, its reliance on those representations could not support a fraud claim.<sup>97</sup> The court declared, "We believe that the failure to insert such language into the contract—by itself—renders reliance on the misrepresentation unreasonable as a matter of law."<sup>98</sup> Thus the court held that Protective either: (1) did not breach the contract because a condition precedent to closing failed to occur, namely, the truthfulness of seller's oral representations; or (2) breached because it had an unconditional duty to

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89. *Id.*

90. *Id.* at 1534.

91. *Id.*

92. *Id.* at 1534–35.

93. *Id.* at 1535.

94. *Id.* at 1542–43.

95. *Id.* at 1543.

96. *Id.* at 1534.

97. *Id.* at 1543.

98. *Id.* The court remanded the case for a determination of whether the oral contract did in fact contain such a condition precedent. *Id.* at 1545.

close and had no excuse of fraudulent inducement.<sup>99</sup>

This holding can be given either a narrow or a broad construction. It may mean only that if a party has reserved a right to approve documents prior to closing, then failure to condition closing on the truthfulness of pretrial representations renders its reliance on those representations unreasonable. It might also mean that when a party enters a contract relying on an oral representation because he does not have time to obtain a written warranty, he must reserve the right not to close if the representation proves false. More broadly construed, *Lazard Freres* forecloses merchants from claims based on oral misrepresentations whenever they could have conditioned their liability or loss on contractual requirements that the representations be true. This rule would restrict the operation of the law of misrepresentation in commercial transactions to those rare circumstances in which transaction costs prevented the parties from creating contractual conditions relating to the truth of the representations.

An even more candid acknowledgment of the new realism is apparent in *All-Tech Telecom, Inc. v. Amway Corp.*<sup>100</sup> All-Tech sued Amway, claiming that its misrepresentations induced All-Tech to engage in a business that failed. In disposing of this claim, Judge Posner observed that the economic-loss doctrine confines contract parties to contract remedies in cases involving product warranties:

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99. *Id.* at 1543–45. The court stated:

As a substantial and sophisticated player in the bank debt market, Protective was under a further duty to protect itself from misrepresentation. It could easily have done so by insisting on an examination of the Scheme Report as a condition of closing. “[W]here, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented. Succinctly put, a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament.” We believe that the failure to insert such language into the contract—by itself—renders reliance on the misrepresentation unreasonable as a matter of law. This, however, does not resolve the case. For Protective does, in effect, claim that it inserted just such appropriate language into the agreement.

*Id.* at 1543 (quoting *Rodas v. Manitaras*, 552 N.Y.S.2d 618, 620 (emphasis added)) (internal citations omitted).

100. 174 F.3d 862 (7th Cir. 1999).

If the seller makes an oral representation that is important to the buyer, the latter has only to insist that the seller embody that representation in a written warranty. The warranty will protect the buyer, who will have an adequate remedy under the Uniform Commercial Code if the seller reneges. To allow him to use tort law in effect to enforce an oral warranty would unsettle contracts by exposing sellers to the risk of being held liable by a jury on the basis of self-interested oral testimony and perhaps made to pay punitive as well as compensatory damages. This menace is averted by channeling disputes into warranty (contract) law, where oral warranties can be expressly disclaimed, or extinguished by operation of the parol evidence rule.<sup>101</sup>

While some observers would see it as an example of “neoformalist” hostility to reliance protection, *All-Tech* is an exercise in pure, policy-driven legal realism. Refusing to engage in mechanical enforcement of misrepresentation doctrine (for example, “Was there a misrepresentation of material fact? Did it induce reliance?”), the court instead adopts the perspective of the merchant seller to whom reliance protection is a “risk of being held liable by a jury.” To protect the seller, the court “channels” the dispute (and future similar disputes) into contract law. There they can be controlled by textual devices such as warranty disclaimers and the parol evidence rule. In contrast to the solicitude for the seller, the court’s attitude to the buyer is hostile, critical of the buyer’s failure to get its promise in writing, and skeptical of the buyer’s honesty in premising a claim on “self-interested oral testimony.”<sup>102</sup> Posner makes the case for textual formalism in the service to realist (albeit non-progressive) policy objectives.

Whether one chooses to classify decisions such as *Thatcher*, *Lazard Freres*, and *All-Tech* as examples of neoformalist textualism or as realist efforts to reshape commercial behavior, the trend they portend is clear: courts will give no protection to reliance on an informal promise unless the promisee can demonstrate a good reason for having failed to memorialize the promise in an express contract. Aside from rare deals

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101. *Id.* at 866. See also *Neibarger v. Universal Coop., Inc.*, 486 N.W.2d 612, 618 (Mich. 1992).

[W]here a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC, including its statute of limitations.

....

... Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.

*Id.* at 618–20.

102. The rhetorical overkill in this phrase reveals the court’s commitment to traditional formalist virtues. All testimony is oral. By drawing attention to the orality of testimony, Posner’s intentional redundancy implies that speech is inferior to writing. He also suggests (1) that all witnesses to oral promises will be parties interested in the transaction, and (2) that juries cannot evaluate the effects of self-interest on credibility.

made under emergency conditions,<sup>103</sup> that burden will be impossible to discharge.

#### IV. THE REALIST ANALYSIS OF RELIANCE

Lon Fuller began *The Reliance Interest in Contract Damages* with these observations:

In the assessment of damages the law tends to be conceived, not as a purposive ordering of human affairs, but as a kind of juristic mensuration. The language of the decisions sounds in terms not of command but of discovery. . . .

It is, as a matter of fact, clear that the things which the law of damages purports to "measure" and "determine"—the "injuries", items of damage", "causal connections", etc.—are in considerable part its own creations, and that the process of "measuring" and "determining" them is really a part of the process of creating them. . . . In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a "loss" only by reference to an unstated ought.<sup>104</sup>

Years before "social constructivism"<sup>105</sup> became intellectually respectable, Fuller's straightforward prose captured its essential insight.<sup>106</sup> Even when exercising what appears to be a factual inquiry,

103. These emergency conditions include the now well-established application of estoppel to subcontractors' bids that are used in a general contractor's bid, under which the general contractor is deemed to have an option contract for a reasonable time to accept the subcontractor's bid because of the logistical difficulty of creating an express contract under the circumstances of the bid process. *Architectural Metal Sys. v. Consolidated Sys., Inc.*, 58 F.3d 1227 (7th Cir. 1995); *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). For an explanation of the exigencies of the bid process, see *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693 (Minn. 1983).

104. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 52–53 (1936).

105. See Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1160–70 (1985). For a description of social constructivist theory and its influence on the social sciences, see Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1085–90 (1991). See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 1–17, 338–55 (1980).

106. Fuller's point had been made much earlier by several Realists, beginning with the Ur-Realist Holmes' famous observation that "[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). Felix Cohen's sustained attack on the naturalness of legal categories also made the point. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

the court in making its “findings” and “determinations” will be engaged in “a purposive ordering of human affairs.”<sup>107</sup> It was this insight that led the realists and later the critical legal studies scholars to deny the very possibility of the formalist claim to apply authoritative rules objectively to objective facts about human affairs. Inevitable moments of judgment and value occur in the labeling process of rule application. Even in the purely factual part of formalist adjudication of a promissory estoppel claim—in the determination of whether a promise induced reliance—we find a normative order.

The text of section 90 requires that a promise induce actual reliance before enforcement will be appropriate.<sup>108</sup> A promisee’s actual reliance on a promise is an almost universal prerequisite to liability under section 90. Despite the formalist requirement of a promise, the reliance requirement preserves the realist half of section 90’s dual nature.

### A. “Real” Reliance

As Fuller argued, ostensibly objective “causal connections”<sup>109</sup> are

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*Legal concepts* (for example, *corporation* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law*, which refer to these legal concepts, are not descriptions of empirical social facts . . . nor yet statements of moral ideals, but are rather theorems in an independent system.

*Id.* at 821. Fuller also repeated Cohen’s warning:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions . . . then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.

*Id.* at 812. See also Peller, *supra* note 105, at 1228.

107. E.g., Peller, *supra* note 105, at 1182–83 (stating that conventional terms of legal discourse such as “loss” purport to reflect “positive content, independent of the terms themselves”). This is not to suggest that the court must create the social construct anew with each ruling. The court experiences the construct as reified. *Id.* at 1157 (“Reification refers to the process by which social reality is experienced as fixed or objective.”).

108. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

§ 90. Promise Reasonably Inducing Action or Forbearance.

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person *and which does induce such action or forbearance* is binding if injustice can be avoided only by enforcement of the promise.

*Id.* § 90(1) (emphasis added).

109. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 60 (2d ed. 1985).

[W]hen causal language is used of the provision or failure to provide another with an opportunity, it is implied that this is a deviation from a standard practice or expected procedure; the notions of what is unusual and what is reprehensible by accepted standards both influence the use of causal language in such cases.

*Id.*

among the creations of law even though they may seem more nearly a datum of nature. If Fuller was correct, we might expect a court's determinations of causation to be culturally contingent rather than objectively inevitable. The interesting feature of section 90 jurisprudence is that the normative elements of the court's findings do not usually appear where one would expect them to in applying the normative elements of the rule, but in the ostensibly objective causal determination mandated by the reliance requirement.

Especially as it appears in the *Restatement (Second)*, section 90 contains an explicit reference to normative considerations because it limits enforcement to those situations in which "injustice can be avoided only by enforcement of the promise," and provides that the remedy for breach "may be limited as justice requires."<sup>110</sup> One would expect contemporary courts to defer their policy and normative-based arguments to the point in their analysis when they reach this element.<sup>111</sup> Instead, most courts adjudicate the reasonableness and propriety of the parties' behavior when determining whether a promise was made, whether it induced reliance, and whether the reliance was foreseeable. Before they reach the last element—injustice—most plaintiffs have already been eliminated by more objective-sounding criteria.<sup>112</sup>

One of the elements that serves to reduce litigation is "inducement." Recent opinions applying the reliance requirement to promissory

110. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

111. Whether enforcement is necessary to prevent injustice is "a legal question for the court, as it involves a policy decision." *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992). See *Henderson*, *supra* note 15, at 383 (finding that the injustice requirement gives courts "wide latitude in redistributing losses resulting from unfilled promises"). *Id.* at 386 (cautioning against equating reliance with the formal detriment that would constitute consideration).

112. Nevertheless, if all else fails the "injustice" requirement is an open invitation for the court to criticize the plaintiff's behavior from a number of perspectives. *Holmes v. Amerex Rent-A-Car*, 180 F.3d 294, 296, 298 (D.C. Cir. 1999) (rejecting claim for promissory estoppel by defendant who took possession of wrecked car and disposed of it, preventing plaintiff from using the car to prove a products liability claim, and finding that plaintiff was "unreasonably dilatory" by failing to inspect the car despite having a reasonable opportunity to do so, and that promissory estoppel "requires the promisee to have acted reasonably in justifiable reliance on the promise"); *McCann v. Jackson*, 429 P.2d 265, 266 (Colo. 1967) (stating that because promissory estoppel is an equitable remedy, relief will be denied if the plaintiff does not come into court with "clean hands"); *Cohen*, 479 N.W.2d at 391 (deciding whether refusal to enforce promise of confidentiality would result in injustice by reference to moral principles). *Henderson* criticized the use of such equitable doctrines as going beyond the proper elements of a section 90 claim. *Henderson*, *supra* note 15, at 379.

estoppel claims have required plaintiff to prove the existence of a strict cause-in-fact relationship between the promise and the reliance-action. A description of this doctrinal element necessitates a brief discussion of the meaning of reliance as a form of behavior. The reliance behavior that the law of contracts concerns is reliance on a "promise."<sup>113</sup> To rely on a promise, a promisee<sup>114</sup> must: (1) believe that a promisor has made a commitment to the promisee to perform as stated;<sup>115</sup> (2) believe that if the promisor performs and if the promisee takes a particular course of action (the reliance action), then the promisee will be made better off than if the promisee fails to take the reliance action;<sup>116</sup> (3) believe that the promisor will perform as promised; and (4) take the reliance action "because of" belief (1), (2), and (3).

The last element of reliance contains a causal term that is doubly problematic. First, as the quotation from Fuller recognized, the legal idea of physical cause-in-fact is a moral and political concept rather than a scientific one.<sup>117</sup> From among all the necessary *sine qua non* conditions of an event, a court will select those that will be designated as its "causes." The selection reflects a normative order rather than a

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113. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) ("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.").

114. Section 90 also protects reliance by a non-promisee, but that rule will not be discussed here. *Id.* § 90(1). Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 28 (1992).

115. HART & HONORÉ, *supra* note 109, at 53–54 (stating the uptake conditions for inducement).

116. Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 701 (1986) ("Reliance refers to investments that will be profitable to the promisee only if performance occurs."); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1267 (1980) (distinguishing "detrimental reliance," defined as the difference to the promisee in utility between non-reliance and reliance on a promise that is breached, from "beneficial reliance," referring to the gain the promisee obtains from relying on a kept promise). The promisee may also believe that if the promisee takes the reliance action and the promisor does not perform, then the promisee will be worse off than if she had not taken the reliance action. *Id.* DeLong, *supra* note 11, at 952–53. This makes reliance a gamble on the promisor's performance. But this second belief is not essential to the existence of reliance.

117. Fuller & Perdue, *supra* note 104, at 52–53. The distinction between the causation of classical physics and legal causation is an oft-made point. On the Realists' attack on legal causation, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 51–63 (1992). Both legal and non-legal conceptions of causation select from among all the "but-for" conditions of the event only those that are deemed in some way significant. HART & HONORÉ, *supra* note 109, at 108–11. Similarly, by "framing" a defendant's action to include only certain of its but-for conditions, the criminal law preserves the liberal view of free choice as a basis for blame and punishment. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 88–96 (1987); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

neutral or objective description.

Second, the application of the concept of causation to circumstances in which persons act on the basis of reasons is additionally problematic.<sup>118</sup> Describing the reasons for a conscious agent's intentional behavior as its "cause" requires a departure from the simple, *sine qua non* concept of physical causation. We do not say that an offer was the "cause" of an acceptance,<sup>119</sup> even though we would admit that "but-for" the offer, the acceptance would not have occurred. Instead, we say that the offer was a "reason" for the acceptance, meaning that while the offer was significant to the offeree's response, it did not alone determine that response: the offeree might have rejected the offer.<sup>120</sup> This way of speaking not only expresses the distinction between necessary and sufficient conditions, but also implies that voluntary human choice (the offeree's choice to accept) breaks the causal chain for some legal purposes. The presumption of voluntary human response complicates simplistic "but-for" causation.

Section 90 does not by its language specify whether promises are to be viewed as "causes" or as "reasons." It requires that the promise "induce" the reliance action. The active agent in the sentence is the promise, not the promisee, who is, if anything, acted upon by the promise. The use of "induce" suggests something more nearly causal than that the promise be a reason for the reliance action. How much more is unclear and so is left open to judicial manipulation.

In addition to the looseness of the concept of "inducement," section 90 contains two other avenues for the introduction of normative elements into the realist analysis of reliance. The most important is that the promisor must have reason to expect the promisee to rely on the promise at the time it was made. The requirement that inducement of the promisee's actual postpromise behavior be foreseeable permits the court

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118. DeLong, *supra* note 11, at 952-53. Cf. Jay Conison, *Assurance, Reliance, and Expectation*, 6 S. CAL. INTERDISC. L.J. 335, 335-38 (1998) (drawing a distinction between reliance and acting on a belief).

119. HART & HONORÉ, *supra* note 109, at 51-57 (stating that causation of intentional action does not mean that the reliance action was an inevitable consequence of the promise, only that it constituted a reason rendering the proposed action more "eligible" and that the action would not have been taken in the absence of the promise). See JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 117-24 (1983).

120. HART & HONORÉ, *supra* note 109, at 54 (finding that statements induce reliance by rendering the reliance action "more eligible" than it would be in the absence of the statement).



to evaluate the degree of rational relationship of the promise to the promisee's decision to rely.<sup>121</sup> Foreseeability also demands that this relationship be apparent to a person in the position of the promisor at the time of the promise.

### *B. Realist Analysis of Reliance*

After the court has determined the existence of a formal promise and the plaintiff has proved that she acted or refrained from acting in some way after the promise was made, the court must determine whether the promise "induced" the action or forbearance. In making this finding, the court applies both an individualized cause-in-fact requirement and a "reasonable person" standard of causation. Plaintiff fails if she cannot satisfy both requirements. Recent decisions illustrate the ways in which policy or normative reasoning in the guise of strict cause-in-fact reasoning has been used to bar promissory estoppel claims by courts as they determine whether the promise actually "induced" the reliance.

The individualized standard requires the reliance act to be induced in the sense of being caused in fact by the promise. The promise must actually induce this person to act. In making this determination, courts employ implicit normative standards in the guise of purely causal reasoning.

#### *1. Reliance That Occurs After a Promise Is Withdrawn*

A clear example of a court making a choice about what will "count" as causal inducement occurs in cases in which the promisor withdraws the promise or otherwise states that it will not perform before the promisee takes the reliance action.<sup>122</sup> Courts refuse to find that reliance action taken after such a disavowal was induced by the original promise. The decision not to consider such reliance as having been induced by the promise does not proceed from simple "but-for" causal reasoning but

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121. The idea of reliance is limited to actions that are rationally related to beliefs according to common understanding. HART & HONORÉ, *supra* note 109, at 57; Conison, *supra* note 118, at 335-38. As Jay Feinman noted, foreseeability is as much of a normative concept in contract law as it is in tort law. Feinman, *supra* note 13, at 715 (stating that a determination that the promisor had reason to know that promisee might rely involves "an application of the court's own views of the proper norms of commercial conduct").

122. *Variety Children's Hosp., Inc. v. Century Med. Health Plan, Inc.*, 57 F.3d 1040, 1042-43 (11th Cir. 1995) (finding that promisor withdrew promise to pay for treatment before treatment was given); *Properties Dev., Inc. v. Sto-Kent Lanes, Inc.*, No. 17059, 1995 Ohio App. LEXIS 2169, at \*6 (Ohio Ct. App. May 24, 1995) (finding that promisor revoked oral promise to contribute to cost of constructing road before plaintiff relied).

from a normative evaluation of the reasonableness of the promisee's behavior and the policies favoring enforcement.

However, there is nothing intrinsic to the cultural or social idea of a promise that would make it subject to repudiation at the promisor's option.<sup>123</sup> It depends on what is understood about the degree of commitment of the promise. "Un-promising" is not a common cultural construct. Nevertheless, as a matter of policy courts seem unwilling to disentangle the effects of disappointed reliance in cases in which the promisee had some warning that performance might not be forthcoming. In such cases, "real" reliance may become irrelevant.

## *2. Reliance That May Be Caused by Something Other Than the Promise*

The problems of joint, additional, or multiple causation have always presented a policy choice to the judicial system. Consider a typical case: A and B simultaneously shoot at C and each bullet strikes a vital organ. C dies immediately. A's act of shooting was not a "but-for" cause of C's death. C would have died anyway from B's gunshot. By the same reasoning, however, B's act of shooting was not a but-for cause of C's death. C would have died anyway from A's shooting. A court concerned with a rule that requires it to determine whether A's act was the legal cause of C's death must choose whether to "ascribe" causation to A's action and this choice will reflect a normative order. Thus, courts are typically unwilling to say that neither of two independent causes of an event is a legal cause if each of them is generated by a "wrongdoer." As Fuller said, courts speak the language of discovery as they create that which they purport to find.<sup>124</sup>

Most courts have elected to exonerate a promisor if the promisee's reliance action could be said to have been caused by an independent, additional cause. Even though a promise would have been sufficient to induce a reasonable person to rely exactly as did the plaintiff, plaintiff loses if her individual circumstance provided a separate cause for her action. Thus in *Martin v. Huntington National Bank*,<sup>125</sup> an employee

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123. *E.g.*, Tiersma, *supra* note 114, at 28 ("The promise is an unconditional act of commitment that goes into effect immediately and therefore cannot be freely revoked.").

124. Fuller & Perdue, *supra* note 104, at 52.

125. No. L-95-077, 1995 Ohio App. LEXIS 5051 (Ohio Ct. App. Nov. 17, 1995). *See also* Reeves v. Alyeska Pipeline Serv. Co., 926 P.2d 1130, 1138 (Alaska 1996) (finding that plaintiff had already disclosed his idea to defendant at the time of the

alleged reliance on an employer's alleged promise of a job in a different city by moving to accept the job offer.<sup>126</sup> The court held that the evidence demonstrated that the employee had already formed the intention to relocate before receiving the job offer and so the moving could not constitute reliance on the promise.<sup>127</sup> It did not consider that the job offer might have constituted an independent cause of the move if it had been sufficient itself to induce the reliance.

The individualized cause-in-fact requirement thus can be used to block enforcement of a promise that would have been adequate to induce reliance in a reasonable person. A typical way is to show that the plaintiff had no other alternative to the reliance action. Thus, in *Moore v. Ford Motor Co.*,<sup>128</sup> a promisee sued for breach of an oral agreement to give the promisee an automobile dealership.<sup>129</sup> His claimed detrimental reliance was forbearance to obtain a dealership from another source.<sup>130</sup> The court held that he could not succeed under section 90 unless he was able to show that he would have in fact qualified for and obtained a firm offer from the other dealership.<sup>131</sup>

Individualized cause-in-fact can also prevent a plaintiff from proving that the reliance action was harmful even in cases in which it might be presumed harmful to a reasonable person. Courts have also held that if the harm a promisee suffers by acting in reliance on the promise would have occurred in any case, the necessary reliance has not been shown. For example, in *Mass Cash Register, Inc. v. Comtrex Systems Corp.*,<sup>132</sup> during negotiations, defendant acquired information about plaintiff's accounts by promising not to use the information. Defendant then breached the promise and began selling directly to plaintiff's main account. The court held that detrimental reliance was not established on these facts because the record also demonstrated that plaintiff would have lost the account in any event because it was unable to serve the customer's needs.<sup>133</sup>

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promise of employment); *Rothman v. Pratt & Whitney Aircraft*, No. CV-44-99-14, 1995 Conn. Super. LEXIS 518, at \*8-9 (Conn. Super. Ct. Feb. 7, 1995) (finding that plaintiff admitted that he had planned to move before receiving job offer).

126. *Martin*, 1995 Ohio App. LEXIS 5051, at \*8.

127. *Id.*

128. 901 F. Supp. 1293 (N.D. Ill. 1995). This case was also discussed in DeLong, *supra* note 11, at 998-99.

129. *Moore*, 901 F. Supp. at 1301.

130. *Id.*

131. *Id.*

132. *Mass Cash Register, Inc. v. Comtrex Sys. Corp.*, 901 F. Supp. 404 (D. Mass. 1995).

133. *Id.* at 410-414, 419-420.

### 3. Reliance That Consisted of the Performance of a Legal Duty

Even if the plaintiff demonstrates that the promise was a “but-for” cause or reason for his reliance, he will be unsuccessful if the reliance action was the performance of a duty under an existing contract, statute, or regulation. A typical case involves a promise given by one party to another who is already bound under an existing contract with the promisor. At common law, the pre-existing duty rule typically renders such promises unenforceable as bargain contracts on the basis that performance of the duty does not constitute fresh consideration for the promise.<sup>134</sup> By contrast, Article 2 of the Uniform Commercial Code permits enforcement of contract modifications without fresh consideration so long as the promisee is acting in good faith.<sup>135</sup>

Several courts have refused to enforce promises under section 90 on the basis that the reliance action was the performance of a duty already owed to the promisor, thereby importing the bargain-contract limitation into the law of estoppel.<sup>136</sup> For example, in *FDIC v. Patel*,<sup>137</sup> the drawer of a letter of credit sought to avoid payment on the grounds that it had posted the letter in reliance on the beneficiary’s promise not to draw on it. The court held that the drawer’s posting could not amount to reliance because it was under a pre-existing contractual duty to post the letter.<sup>138</sup> In *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*,<sup>139</sup> the court denied a promissory estoppel claim on grounds, in part, that the promisee/dealer’s performance of duties under an existing dealership contract could not constitute reliance on the manufacturer’s postcontractual promises.<sup>140</sup>

In such cases, the courts do not consider whether the promisee might have breached its pre-existing obligation in the absence of the promise. Individualized cause-in-fact seems not to be the issue. The decision to deny the reality of reliance in such cases may reflect a normative decision not to give cognizance to the “right” to violate a legal duty. It

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134. See RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

135. U.C.C. § 2-209 (1989).

136. *E.g.*, *Cambridgeport Savings Bank v. Boersner*, 597 N.E.2d 1017, 1024 (Mass. 1992) (finding that guarantors’ alleged reliance on bank’s promise to fund loan interest payments in incurring expense and marketing condominiums was performance of contractual duty and so was not induced by the bank’s promise).

137. 46 F.3d 482 (5th Cir. 1995).

138. *Id.* at 486–87.

139. 898 F. Supp. 1198 (W.D. Ky. 1995).

140. *Id.* at 1205.

may also be a holdover from the pre-existing duty rule in the consideration doctrine or it may result from a judgment that enforcement of the promise in such cases is not necessary to avoid injustice. In any case, the reliance determination is a policy-driven exercise in the construction of reality rather than a discovery of mute fact about the world.

## V. REFORTIFYING THE CITADEL: STATUTORY BARRIERS TO SECTION 90

The counterattack on section 90 liability is not limited to the proliferation of marketplace disclaimers and the development of a judicial obstacle course. To the class of potential defendants, the success of the disclaimer strategy depends both on meticulous documentation of negotiation practices and on having the right judges in place to hear the cases that arise.<sup>141</sup> More lasting advantage lies in procuring the enactment of statutes in derogation of the common law source of promissory estoppel. The defendant classes have thus turned their attention to obtaining legislative barriers to section 90. To date, the most successful of these have been Credit Agreement Acts (CAA).

Before the CAA, the following scenario was common:<sup>142</sup> Lender and borrower (let us say, Farmer) have had a long financial relationship. Farmer has a large secured loan from Bank that is by its terms callable at the end of each year. To date, the loan has been refinanced annually with the accrued interest being added to the unpaid principle. At some point, Farmer visits Lender's office and a discussion ensues about the next crop season. Farmer is edgy: crop prices have plummeted, the farm is a marginal operation, and selling out may be the only reasonable thing to do. Lender's agent, a loan officer who has a long personal relationship with Farmer, makes reassuring noises to Farmer, urging him to apply for renewal of the loan and promising that it will be rolled-over. Lulled by these reassurances, Farmer does not sell out but plows on. Inevitably, Lender surprises Farmer by refusing to refinance the loan and demanding payment. Farmer, left high and financially dry, counterclaims under section 90 for the reliance damages induced by reliance on Lender's assurances. Lender must defend itself before a jury

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141. See Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718–19 (1982) (“The more focused and sustained methods of legislation and regulation are apt to have more dramatic effects than does alteration of common law rules and thus will attract the primary efforts of those trying to use the law to promote their own interests.”).

142. This scenario is based loosely on the facts in *State Bank of Standish v. Curry*, 500 N.W.2d 104, 107–111 (Mich. 1993) (finding that the Bank's promise of “support” was sufficiently definite to support claim under theory of promissory estoppel).

of the ungrateful Farmer's peers. A number of these juries found for Farmer, finding that Lender had induced foreseeable reliance on its promise to renew the loan, and courts, finding that justice required enforcement of the promise, awarded damages in disturbing amounts.<sup>143</sup> "Lender liability" became a much dreaded phrase.

Lenders in several states thus secured enactment of CAAs. Although they take several forms, most of them by their terms bar judicial enforcement of any unsigned loan commitment promise under any theory of obligation.<sup>144</sup> It is fair to call the CAA a "Super Statute of Frauds" because it requires more than the traditional statute of frauds: all material terms must be contained in the writing and it must be signed by both parties, not just the party to be charged.<sup>145</sup> The CAAs in some states support dismissal of lender liability claims based on promissory estoppel.<sup>146</sup> A common prerequisite to the lender's right to raise the

143. See generally John L. Culhane Jr. & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 BUS. LAW. 1779, 1779 (1990) (discussing report of ABA Task Force containing Model Lender Liability Limitation Statute); Todd C. Pearson, Note, *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, 76 MINN. L. REV. 295 (1991); Robert D. Rowe, Special Project Note, *Written Agreements in the Lender-Borrower Context: The Illusion of Certainty*, 42 VAND. L. REV. 917 (1989).

144. See *Resolution Trust Corp. v. Thompson*, 989 F.2d 942, 943-44 (7th Cir. 1993) (finding that CAA bars claims and defenses of debtor based on alleged oral promise of creditor to forgive unpaid balance of loan); *Westinghouse Elec. Corp. v. McLean*, 938 F. Supp. 487, 492-93 (N.D. Ill. 1996) (finding that defendants' counterclaim and defense were barred by the credit agreement act); *Gen. Elec. Capital Corp. v. Donogh Homes, Inc.*, No. 93-C-5614, 1993 U.S. Dist. LEXIS 17690, at \*5-10 (N.D. Ill. Dec. 15, 1993) (barring all claims and defenses related to an alleged oral agreement to extend or modify existing written credit agreements); *Univex Int'l, Inc. v. Orix Credit Alliance, Inc.*, 902 P.2d 877, 879 (Colo. Ct. App. 1995) (finding that the Act bars both promissory estoppel and fraud claims); *First Nat'l Bank in Staunton v. McBride Chevrolet, Inc.*, 642 N.E.2d 138, 142 (Ill. App. Ct. 1994) (stating that the Act bars all claims and defenses relying on an oral promise, whether sounding in contract or tort); *Whitney Nat'l Bank v. Rockwell*, 661 So.2d 1325, 1329-31 (La. 1995); *Fleming Irrigation, Inc. v. Pioneer Bank & Trust Co.*, 661 So.2d 1035 (La. Ct. App. 1995); *American Realty Trust, Inc. v. First Bank of Missouri*, 902 S.W.2d 884 (Mo. Ct. App. 1995); Pearson, *supra* note 143, at 296-97. *Contra* *Werth v. Golden Plains Credit Union*, No. 94-1286-DES, 1995 U.S. Dist. LEXIS 14640, at \*17 (D. Kan. Sept. 19, 1995) (permitting claim of promissory estoppel in spite of statute of frauds); *Wabash Grain, Inc., v. Bank One*, 713 N.E.2d 323, 326 (Ind. Ct. App. 1999) (stating in dictum that estoppel might overcome the CAA statute of frauds to prevent "the infliction of an unjust and unconscionable injury and loss").

145. *Consolidation Servs., Inc. v. KeyBank Nat'l Ass'n*, 185 F.3d 817, 819-20 (7th Cir. 1999).

146. *Klem v. First Nat'l Bank of Chicago*, 655 N.E.2d 1211, 1212-13 (Ill. App. Ct. 1995) (stating that the legislative intention was to bar promissory estoppel claims in

statutory defense is that it gave the plaintiff written notice of the statute in an approved form. The CAA has also barred actions premised on oral promises of credit made by nonfinancial institutions during negotiations for loans or acquisitions.<sup>147</sup>

In sum, the new generation of statutes of frauds is directed specifically at the equitable exceptions to the old statutes of frauds.<sup>148</sup> Just as the realist/progressive principles such as bad faith and unconscionability crystallized into consumer protection legislation and agency regulation, the anti-progressive formalist principles also aspire to a status beyond the reach of hostile judges. In light of the success of CAA, one can anticipate efforts to secure such “Super Statutes of Frauds” in other areas, such as employment, insurance, and franchise litigation, if potential defendants can muster the necessary political power.

## VI. CONCLUSION

The adjudication of promissory estoppel cases is thoroughly realist even when it seems to be most formalist. Focus on the form of the promise requires interpretive commitments that introduce normative values. Giving effect to formal disclaimers of liability also requires extensive interpretive efforts that implement underlying normative commitments. Making factual findings about whether the promise induced reliance also involves normative judgments about the quality of the commercial actor’s judgment. Several courts have openly announced an intention to channel commercial dealmaking into formal contracts by refusing to protect reliance that occurs in its absence.

The pattern of interaction between rules and standards, formalism and realism, and merchant and court emerging from the history of promissory estoppel strongly resembles Rose’s description of the geologic evolution of law:

Even if the legal rules have moved toward mud, private bargainers often try to install their own little crystalline systems through contractual waivers of warranties or disclosure duties (for example, the “as is” or “no warranty” sale). These private efforts in effect move things into the pattern of a circle, from crystal to mud and back to crystal. And the circle turns once again when the courts ban such waivers, as they sometimes do, and firmly re-establish a rule of mud—only to be followed by even more artful waivers.<sup>149</sup>

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lender liability cases).

147. *Whirlpool Fin. Corp. v. Sevaux*, 96 F.3d 216, 219–20, 225 (7th Cir. 1996) (barring affirmative defense based on plaintiff’s oral promise to invest in defendant’s firm).

148. See *Culhane & Gramlich*, *supra* note 143, at 1791.

149. Rose, *supra* note 2, at 582–83 (footnote omitted).

Whatever the intentions of the drafters of section 90 may have been, the doctrine of promissory estoppel has not led to a commercial world structured by webs of nonbargain, promissory obligation. Instead well-counseled commercial parties have learned the formalized incantations necessary to disclaim legal liability. Having cast the magic spells, they are free to promise and induce reliance to their hearts' content, shielded from liability until they participate in the ritual of offer and acceptance. Even the few unfortunates who forget the magic words may hope for rescue by a neoformalist judge bent on punishing gullible promisees who fail to get their deals in writing. Thus, the net effect of the "anti-formalist" section 90 on the commercial world has been to create a simple formalist hoop for promisors to jump through on the way to bargain contract. If you listen closely, you can hear Grant Gilmore's ironic chuckle.



