The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"--A Nonunified Theory

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CONTENTS

I. INTRODUCTION ........................................ 351

II. A HISTORY OF CONTRACT THEORY THROUGH A "UNIFIED" PERSPECTIVE ........................................ 357
   A. Classical Contract Theory and its Progeny .................. 357
   B. Fuller's Reliance: Opening of Pandora's Box ............... 364
   C. The Death of Contract and the New Spirit of Contract .... 368
      1. Promissory Estoppel: Part Deux .......................... 371
   D. Efficiency and Economics .................................. 375
   E. The Fairness Inquiry ....................................... 379
   F. Fairness Micro-Management and Systemic Fairness ........ 391

III. THE LAW OF SATISFACTION: A SEARCH FOR "JURAL RUDIMENTS" AND HUMAN VALUES ............... 394
      1. Satisfaction Clauses: Is Subjective Satisfaction Defined Objectively? ........... 401

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B. Satisfaction: The Doctrine of Substantial Performance 414

C. Satisfaction: Assignment of Lease ..................... 417

D. Satisfaction: Assignment of Personal Service Contracts 419

E. Judicial Micro-Management: Adjustments to Covenants Not to Compete ..................... 423

F. The "Best Efforts" Doctrine .......................... 425

G. Judicial Satisfaction: Plea Bargaining as Contract ... 427

H. Comfort Instruments: Advancing the Frontier of Reliance ........................................ 428

I. Summary ............................................. 431

IV. THE NORMS OF CONTRACT: OPERATIVE NORMS UTILIZED IN POLICING OF CONTRACTS AND IN THE ENFORCEMENT DECISION .......................... 435

A. Norms of Traditional Contract Doctrine ............. 438

1. Certainty and Evidentiary Norms ..................... 438

2. Predictability Norm ................................. 439

3. Contract as Promise or Moral Convention ............. 440

4. Efficiency, Autonomy, and Free Will Norms .......... 441

B. "New Spirit" of Contract Norms: Good Faith and Fair Dealing .................................... 442

C. The Reliance Norm .................................... 443

D. The Norms of Equity: Fairness and Justice .......... 444

V. "INTO THE CALDRON: ALL OF THESE INGREDIENTS ENTER IN VARYING PROPORTIONS" .......................... 445

A. Departmentalization: A Beneficial Side

Effect of a Non-Unified Approach ....................... 446

1. Transactional/Relational Dichotomy ................... 447

2. Discrete/Long-Term Relationships ..................... 448


4. Custom Drafted Contracts and Standard Form Contracts ............................................. 450

B. Contract Law as a Normative Composite .............. 451

VI. CONCLUSION ............................................. 453
These rudimentary [jural] ideas are to the jurist what the primary crusts of the earth are to the geologist.

—Henry Sumner Maine

I was trying to reach land, the solid land of fixed and settled rules . . . . [However,] the nature of the judicial process . . . is not discovery, but creation . . .

—Benjamin N. Cardozo

The truth is, that the law is always approaching, and never reaching, consistency.

—Oliver Wendell Holmes

I. INTRODUCTION

The evolution of Anglo-American contract law has garnered the attention of many of the twentieth century’s great jurisprudential scholars. Contract law’s evolution has a surprisingly short time frame. Contract’s predecessor, the common law writ system, was alive well into the nineteenth century. Some scholars, such as Professor Gilmore, have already written a eulogy to the relatively brief existence of the law of contract. He has argued that contract’s twin, the law of torts, has won the battle for survival through a juristic Darwinism. Professor Gilmore
correctly emphasizes that the classical theorist's fanaticism with the demarcation between contract and tort are, in many cases, purely semantical. The rise of the concepts of promissory estoppel\(^7\) and unjust enrichment\(^8\) has further blurred the dividing line between contract and tort. Gilmore takes note of "the absurdity of attempting to preserve the nineteenth century contract-tort dichotomy.\(^9\)"

Contract law has been characterized as formalistic in content and application. The formalism of classical contract theory has long been the focus of most black letter renditions of the rules of contract. Contract dogma dictates the need for mutual assent, through offer and acceptance, coupled with an exchange of consideration.\(^10\) It requires that the agreement be between two parties possessing legal capacity and that the consideration involve a legal subject matter. Each of the these requirements of contract have provided protective umbrellas for layers and

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\(^7\) The acceptance of promissory estoppel or detrimental reliance as a separate ground for recovery was "codified" as early as 1932. \textit{Restatement of Contracts} § 90 (1932); see also \textit{Restatement (Second) of Contracts} § 90 (1979).

\(^8\) Unjust enrichment is often referred to as quasi-contract. One may argue that the fact that the recovery is not necessarily based upon a bargained for exchange brings it outside the realm of contract. Others argue that the fact that one is attempting to recover for a benefit bestowed is reason enough to view it as a contract remedy. See \textit{Gilmore, supra} note 5, at 89. Whether considered as quasi-contract or quasi-tort, unjust enrichment and promissory estoppel have expanded the "law of obligations" and have widened the range of private "transactions" for which judicial relief will be granted.

\(^9\) \textit{Id.} at 90.

\(^10\) \textit{See generally} Morris R. Cohen, \textit{The Basis of Contract}, 46 \textit{Harv. L. Rev.} 553 (1933) (examining the beliefs, policies, and theories from which contract law developed). "The whole of the modern law of contract, it may be argued, . . . respond[s] to the need of greater or finer discrimination in regard to the \textit{intentional character of acts}." \textit{Id.} at 578 (emphasis added).
layers of contract doctrine. From the Statute of Frauds to the infancy law doctrine, the law of contracts is filled with formalistic rules that have been fragmented into numerous minority views and are of little universal or uniform application. As these layers of doctrine have been exposed and criticized, the notion of a unified theory of contract, at least in its classical garb, has been dealt a serious blow. Professor Langdell's "riot of pure doctrine," encompassing the notion that an entire field of law could be created and formalized into a doctrinal general theory, was doomed.

Professor Gilmore's argument that contract law has been absorbed by the ever-expanding realm of tort is not without merit. One may argue that the "death of contract," in its pure or classical form, also means the "death of tort" by the blending of the two fields into a hybrid "law of obligations." The expansion of estoppel "may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation." A more accurate hypothesis would be to argue not the death of contract but the death of the notion of a unified theory of contract. The history of contract is one of numerous expositions of unified theories, most of which have spawned variant theories and scholarly criticism: Blackstone natural law theorists legal positivists, classical theorists begot legal realists.

11. The infancy law doctrine is an example of the deconstruction of a specific contract doctrine. It has disintegrated into a number of minority doctrines: benefit rule, depreciation rule, misrepresentation of age rule, necessities doctrine, doing business rule, and emancipation doctrine. See Larry A. DiMatteo, Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability, 21 OHIO N.U. L. REV. 481, 488-99 (1995); see also Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L.J. 997, 1095 (1985) (explaining that the various doctrines obscure "concrete contractual issues").

12. GILMORE, supra note 5, at 98. Simply stated, Langdell's theory is that "law is doctrine and nothing but doctrine—pure, absolute, abstract, scientific . . . ." Id. at 90.

13. Id.

14. See infra notes 35-39 and accompanying text.

15. Mansfield advocated an expansive view of contract premised upon both the notion of moral obligation and the "establishment of morality as [the] test" of enforceability of promises. PARRY, supra note 4, at 9.

16. See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (H.L.A. Hart ed., 1980) (discussing the classical and mainstream theories of natural law). The natural law theorists have been associated with the notion that the jurisprudential scholar's task is to determine what the law "ought to do"; that is, the belief that morality and the law are inseparable. In summarizing the concept of "practical reasonableness" in natural law, Professor Finnis states:

Now we can see why some philosophers have located the essence of 'morality' in the reduction of harm, others in the increase of well-being, some in social harmony, some in universalizability, . . ., some in the all-round flourishing of the individual. . . . Each of these has a place in rational choice of commitments . . . Each, moreover, contributes
to the sense, significance, and force of terms such as ‘moral’, ‘[morally] ought’, and ‘right’ . . . .

Id. at 126 (alteration in original). St. Thomas Aquinas, in Summa Theologiae, posits his version of natural law. In short, human law is the product of human reason which allows all humans to derive the one true eternal law which all humans possess by nature. “Accordingly it is clear that natural law is nothing other than the sharing in the Eternal Law by intelligent creatures.” 28 THOMAS AQUINAS, SUMMA THEOLOGIAE 23 (Thomas Gilby O.P. ed., 1966). Additionally, Aquinas notes, “[J]ustice took its start from nature, and then certain things became custom by reason of their usefulness; thereafter the things put forward by nature and approved by custom were sanctioned by fear and reverence for the law.” 28 id. at 27 (quoting CICERO, DE INVENTIONE ORATORIA II 53); see also THOMAS AQUINAS, SELECTED PHILOSOPHICAL WRITINGS 419-20 (Timothy McDermott trans., 1993).

17. John Austin is considered the father of legal positivism. Austin believed that legal jurists should not be concerned with the ought to of natural theory but should study law as it is, or what is called the positive law. For Austin, the positive law was the enunciation of “commands” by a sovereign body to its public charges. “This analytical approach rigorously distinguished positive law from matters such as morality and justice. . . . Positive law . . . was defined by Austin as a species of command . . . [that] flows from a determinate source. . . . The determinate source of these commands is a sovereign . . . .” R.B. VERMEESCH & K.E. LINDGREN, BUSINESS LAW OF AUSTRALIA 616 (2d ed. 1973) (emphasis omitted). Two variant schools of positive law are associated with Hans Kelsen’s “pure theory” of positive law and H.L.A. Hart’s “primary-secondary” rules of law. See H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. 1961); HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 1967).

18. The classical theory of contracts has often been associated with laissez-faire economics. The legal counterpart is the liberal notion of freedom of contract. The basis for enforcement should thus be the intent or agreement of the parties. It was not for the courts to determine the normative values of a given transaction. If a transaction possessed the needed formalities, then enforcement of the contractual obligation would be an action for the court. It was not for the court to determine if there were factors of procedural unfairness (unequal bargaining positions) or of substantive unfairness (unconscionable contract terms). “[T]he shibboleths ‘freedom of contract’ and ‘sanctity of contract’ became the foundations on which the whole law of contract was built. . . . [Judges] thought that it was just to enforce contractual duties strictly according to the letter.” P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 9 (4th ed. 1989).

19. Professor Lon Fuller is the father of legal realism. “[H]e portrays the formal requirements of [classical] contract as being in dialectical, productive tension with their functional goals . . . .” James Boyle, Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance, 78 CORNELL L. REV. 371, 372 (1993). In short, reliance upon formalities would render contract doctrines unfair in substance and irrational in application. For example, the fictional finding of consent or intent to imply contractual terms is an obvious rue. Instead, the notion of process and of developing formal rules that would foster the ends of justice and fairness was the proper approach to contract. As stated by Professor Fuller: “The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to accept as sufficient justification for a decision the ‘non-technical’ considerations which really motivated it.” L.L. FULLER, AMERICAN LEGAL REALISM, 82 U. PA. L. REV. 429, 435 (1934).

This Article begins with the premise that there is no generally accepted unified theory of contract. A review of the case law is undertaken in order to uncover the normative mind-sets used by judges in deciding contract disputes. The search for underlying norms or rationales in contract is far from a novel concept. The “new spirit” of contract theorists and the notion of “fairness of exchange” have provided justifications for the loosening of the strict application of traditional contract doctrine and for the expansion of its remedial net. Notions of substantive fairness and fair dealing have long been an accepted part of American jurisprudence. However, contract purists

20. It is true that many of our greatest jurisprudential scholars have attempted to formulate a general theory of contract. E.g., E. Allan Farnsworth, Legal Remedies for Breach of Contract, 70 COLUM. L. REV. 1145 (1970); Robert S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory about Law and Its Use, 66 CORNELL L. REV. 861 (1981). It is also true that a number have rejected the notion of a unified theory. “Indeed it is a point of some of these critics (for example, Friedman, Gilmore, Macneil) that the search for a central or unifying principle of contract is a will-o’-the-wisp, an illusion typical of the ill-defined but much excoriated vice of conceptualism.” CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 3 (1981) (emphasis added).

21. An early example of such a normative mind-set was espoused by Lord Mansfield, who believed all promises, with or without “commercial consideration,” should be binding. Thus, gratuitous, charitable, and familial promises are to be equally binding as a contract to purchase goods. See GILMORE, supra note 5, at 18 & 110 n.32 (citing Hawkes v. Saunders, 98 Eng. Rep. 1091, 1091 (1782) (“[T]he ties of conscience upon an upright mind are a sufficient consideration.”)).


23. See generally P.S. Atiyah, Contract and Fair Exchange, 35 U. TORONTO L.J. 1 (1985) (theorizing that, although contract law has traditionally not been concerned with the adequacy of consideration, courts have indeed concerned themselves with substantive fairness of exchange through other means).

have clung to the belief that these developments were not a direct affront to the mystical notion of a unified theory. Unified theories have justified the enforcement of contracts based upon such precepts as the classical "meeting of the minds" of the parties,\(^5\) the "morality" of contract, contract "as promise,"\(^2\) and the "bargain principle."\(^2\)

One way to examine a subject is to study it at its fringes. In order to understand the beginning of the universe, scientists have studied its expansion by looking out to far off galaxies. It is the technique of examining the remnants of the "big bang" in order to reverse in theory and reconstruct the moment of creation.\(^2\) Alternatively, in the words of Judge Posner, it is at the fringes of the law that new "discoveries" are incorporated into the law so as to "cause the least perturbation in the system."\(^2\) So, in order to understand the essence of contract we need to look to the frontier of contract law, that area of the law where contractual certainty is at its weakest.\(^3\) The law of satisfaction,\(^3\) substantial performance,\(^3\) and of quasi-contractual instruments or "comfort letters"\(^3\) are among the areas that are examined in order to


26. See FRIED, supra note 20, at 14-17. But see Randy E. Barnett, Some Problems with Contract as Promise, 77 COLUM. L. REV. 1022, 1025 (1992) ("But a moral theory of promising, standing alone, would have courts enforcing purely moral commitments, which is tantamount to legislating virtue.").

27. See RESTATEMENT (SECOND) OF CONTRACTS § 75 (1979); see also Melvin A. Eisenberg, The Bargain Principle and Its Limits, 95 HARV. L. REV. 741, 742 (1982) ("By bargain, I mean an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other.").

28. One commentator has noted: By peering into the deep recesses of space, the astronomers are, in effect, looking back in time to periods in the history of the cosmos when the galaxies were in their infancy. Since the light from a galaxy 12 billion light years away took 12 billion years to reach the earth, they are seeing the galaxy as it appeared [12 billion years ago]. Kim A. McDonald, Life History of the Cosmos, THE CHRON. OF HIGHER EDUC., Dec. 14, 1994, at A10.

29. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 81 (1990). "We try... to accommodate the new discovery by adjusting the periphery of our epistemic system rather than by changing the core." Id.

30. Judge Posner defines "thinking like a lawyer" as "an awareness of approximately how plastic law is at the frontiers..." Id. at 100 (emphasis added).

31. See infra part III.

32. See infra part III.B.

33. See generally Larry A. DiMatteo & Rene Sacasas, Credit and Value Comfort Instruments: Crossing the Line from Assurance to Legally Significant Reliance and Toward a Theory of
better understand the "spirit of contract." First, however, a brief look at some of the widely recognized "unified" theories of contract law is in order.

II. A HISTORY OF CONTRACT THEORY THROUGH A "UNIFIED" PERSPECTIVE

A. Classical Contract Theory and Its Progeny

Legal history in general, and, more specifically, Anglo-American jurisprudence, is filled with numerous general theories of law. In the eighteenth century, we were given the Blackstonian construct that, by some almost divine intervention, the common law of England, like the Ten Commandments, had descended upon us from above; that through the use of the Eighteenth Century's defining innovation, the scientific method, one could discover the one true law already embodied in the common law. For Blackstone, this gold mine of reason had miraculously developed unknowingly and only had to be mined. New law was not

34. "Jurisprudence" is defined as the "philosophy of law, or the science which treats of the principles of positive law [laws adopted by a proper authority for the government] and legal relations." It comes from the Latin jurisprudentia or "legal science." BLACK'S LAW DICTIONARY 854-55 (6th ed. 1990); see also THOMAS E. HOLLAND, JURISPRUDENCE (12th ed. 1916). Jeremy Bentham gives the accepted "dual" definition of jurisprudence as the study of what law "is" or what it "ought" to be: 

"[J]urisprudence can have but one or the other of two objects: 1. To ascertain what the law is [or] 2. To ascertain what it ought to be." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. XVII, § 2 (spec. ed. 1986) (1780) (footnote omitted). For an insightful study of the definitional problem of jurisprudence, see R.H.S. Tur, What Is Jurisprudence?, 28 PHIL. Q. 149 (1978).

35. William Blackstone lived from 1723 to 1780 and was appointed to a professorship at Oxford in 1753. See Charles M. Haar, Preface to 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at xxi, xxi (1962). The Commentaries comprise his contribution to the "quantification" of a general theory of law. See 4 id. at xxvii. Haar wrote:

That the Commentaries are a milestone in legal history is without question. They are a starting point for understanding the common law. They present a storehouse for study in intellectual history, a unified and comprehensive statement of the eighteenth century's ideas and assumptions as applied to the ordering of society through law.


36. "The old Blackstonian theory of pre-existing rules of law which judges found, but did not make . . . ." CARDOZO, supra note 2, at 131.
needed, for all the questions had already been answered. It was a conservative "ijtihad" premised on the belief that the legal system and its substantive law did not have to reflect the commercial and technological upheaval represented in the industrial revolution. Through scientific intellect, one only had to discover the unifying truths that underscored all areas of the law. Blackstone's reactionary call allowed the jurist the luxury of not needing to transform the law to meet the needs of rapidly changing economic and social conditions. The law was the bedrock that provided the stability needed to prevent civilized society from crumbling into anarchy. His judicial mandate was clear: "Let us preserve, unchanged, the estate which we have been lucky enough to inherit."

This can be considered the first unified theory of our common law. "Our early common law had no general theory of contract in the sense that, provided they satisfied certain legal tests, promises or agreements generally should be enforceable by the courts. All that it had was a system of writs designed to protect rights deriving from a few transactions . . . ." The writ system was doomed to fail, for law must react to the changing conditions of society or the anarchy it is intended to prevent would surely reign. The history of contract jurisprudence is one of various attempts at creating a unified theory to justify the legal enforceability of private obligations. The "promise theory" of contract has held sway for the greater part of this century. Its banner has been championed in successive generations by Samuel Williston, as reporter

37. In Islamic law, the "ijtihad", or notion of independent reasoning, was terminated in the tenth century because "early scholars had interpreted the divine law (the Shari'a) sufficiently." Richard Schaffer et al., International Business Law and Its Environment 47 (2d ed. 1993); see also Nabil Saleh, The Law Governing Contracts in Arabia, 38 Int'l & Comp. L.Q. 761, 763 (1989) ("Sunni jurists of the early tenth century . . . and onwards proclaimed that the door of "ijtihad" (the exercise of human reason in order to find a rule of Shari'a law) was closed.").

38. One commentator noted:
At the end of the Napoleonic Wars Britain was clearly the world's leading manufacturing nation . . . . It emerged as the world's leading commercial nation . . . accounting for between one-fourth and one-third of total international commerce . . . . Britain retained its dominance as both an industrial and trading nation for most of the nineteenth century.


40. Parry, supra note 4, at 3. "[In] the seventeenth and eighteenth centuries . . . the writ of "assumpsit" had opened the door wider to provide a general remedy for the breach of an agreement and before the doctrine of consideration had been fully defined as a workable criterion for determining what agreements should be legally enforceable . . . ." Id. at 8.
of the Restatement of Contracts, and E. Allan Farnsworth, as reporter of the Restatement (Second) of Contracts. The Restatement (Second) of Contracts defines a contract as "a promise ... for the breach of which the law gives a remedy ..." The importance of promise as the basis of contract is that it requires judicial intervention into the world of future performances. A promise is a commitment to a future performance. Such a recognition was a complete departure from what had come before in the English writ system. Professor Farnsworth poses the following query:

From the standpoint of contract law, the decision to recognize purely executory exchanges of promises opened a Pandora’s box of problems. What could the law do to ensure that the exchange of promises was followed by the exchange of performances expected by the parties? ... Were any limits to be placed on the expectations for which recovery would be allowed?

One of the attempts to limit the scope of the enforceability of promises is the "will theory." For a promise to be binding there must be a subjective "meeting of the minds," or wills, between the contracting parties. The party being bound had to subjectively intend to enter into a binding contractual obligation. This notion that one could disaffirm a contract if she could prove that there had been no subjective intent to make a promise was a fundamental tenet of contract law throughout the nineteenth century. More recently, Professor Fried espoused that "so
long as we see contractual obligation as based on promise, on obligations that the parties have themselves assumed, the focus of the inquiry is on the will of the parties.” The importance of promise as the gauge of contractual liability is fundamental. By focusing upon the “will of the parties,” the arbiter is precluded from inquiry into extraneous matters such as injury to the other party. Professor Fried argues that to the extent that contract is viewed as promise, then the “Death of Contract” theorists will fail in their doctrinal attempt to “assimilate contractual obligation to the law of torts.”

Consensus ad idem, or the subjective meeting of the minds, still rings true in legal folklore. However, the inherent inability to determine subjective intent gave way to the use of a community standard, or objective standard, for determining intent. Even as far back as the time of Henry Sumner Maine’s writings, the subjective-objective dialectic began to acknowledge the distinction between the ideal and that of practical application. “Lastly, the Consensual Contracts emerge, in which the mental attitude of the contractors is solely regarded, and external circumstances have no title to notice except as evidence of the inward undertaking.”

Justice Holmes viewed legal development as the inevitable movement towards objectivity and formalism. “The law moved from ‘subjective’ to ‘objective,’ from ‘internal’ to ‘external,’ from ‘informal’ to ‘formal.’”

The Anglo-American preference for objective standards that could be easily and fairly applied soon came to the fore. “[T]he ‘objective

48. FRIED, supra note 20, at 4 (emphasis added).
49. E.g., GILMOR, supra note 5.
50. FRIED, supra note 20, at 4.
51. The finding of intent or “mutual assent” has been the core requirement for contract formation in Anglo-American jurisprudence. In his discussion of the “discrete norm,” Professor Macneil notes that “two of the common contract norms [are the] implementation of planning and effectuation of consent.” MACNEIL, supra note 22, at 59-60.
52. MAINE, supra note 1, at 328 (emphasis added).
53. GILMORE, supra note 5, at 41; see also HOLMES, supra note 3, at 230 (“It is said that consideration must not be confounded with motive. . . . A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding.”).
54. The movement from the subjective to the objective has been a relatively universal phenomena. For example, with respect to Australia, it has been noted: “In the nineteenth century it was common to regard a contract as resulting from a true meeting of minds. There had to be a genuine consensus ad idem . . . . The modern tendency is to determine the existence of agreement on a more objective basis . . . .” VERMEESCH & LINDGREN, supra note 17, at 133. The use of external manifestation and standards theoretically made the judges’ “discovery” of intent an easier task. “If . . . we can restrict ourselves to the ‘externals’ . . . then the factual inquiry will be much simplified . . . .” GILMORE, supra note 5, at 42.
The theory of contract' became the great metaphysical solvent—the critical test for distinguishing between the false and the true.”55 The subjective meeting of the minds was transplanted by the implication of intent through the use of the reasonable person principle. This objective approach has a lineage almost as long as its subjective counterpoise.56

“The objective approach of the law to nearly all questions of agreement, assent, or intention in the law of contract was established beyond dispute by the end of the classical period . . . .”57 The objective notion of law far precedes the classical period of Anglo-American contract law. Kant notes that imperatives or commands are “formulas expressing the relation of objective laws of volition in general to the subjective imperfection of the will of [the] rational being.”58 He espouses that “nothing remains which can determine the will objectively except the law, and nothing subjectively except pure respect for this practical law.”59 Thus, the normative “ought to,” as filtered by the subjective will, is, for Kant, the simple duty of all rational beings to obey the law despite “inclinations” that would indicate otherwise.60

Judge Learned Hand enunciated the objective approach to contract as well as anyone in the 1911 case of Hotchkiss v. National City Bank.61

A contract has, strictly speaking, nothing to do with the personal . . . intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties . . . . If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .

. . . [W]hatever was the understanding in fact . . . is of not the

55. Gilmore, supra note 5, at 42-43.

56. See, e.g., Posner, supra note 29, at 25 (“On the side of law as an objective entity . . . we have the distinguished lineage of Antigone, Socrates, Coke, Blackstone, Langdell . . . . On the side of law as politics . . . we have the equally distinguished lineage of . . . Hobbes, Bentham, Holmes, and H.L.A. Hart . . . .”).

57. Atiyah, supra note 18, at 11. The classical period is defined by Professor Atiyah as the eighteenth and nineteenth centuries. See id. at 8.


59. Id. at 17.

60. See id. Kant makes clear that the will’s determination of its duty to obey the law, and not the effects of the law, is the ultimate good. “[T]he pre- eminent good can consist only in the conception of the law in itself . . . so far as this conception and not the hoped-for effect is the determining ground of the will.” Id.

slightest consequence, unless it took form in some acts or words, which, being reasonably interpreted, would have such meaning to ordinary men. . . . The rights and obligations depend upon the law alone.62

The objective approach to intent and contracts in general has been "codified" in the Restatement (Second) of Contracts' bargain principle.63 Section 17 states that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange."64 The operative word is "manifestation." Actual assent is not required; an outward or objective manifestation is all that is required. Apparent assent is sufficient even if lack of actual assent can be proved. "It is clear that a mental reservation of a party to a bargain does not impair the obligation he purports to undertake."65

A major doctrinal development was the acceptance of an exchange of promises as fulfillment of the "mutuality of consideration" requirement dictated under the "bargain theory" of contract. A promise based upon merely "moral consideration" was to be viewed as being outside the sweep of "promise[s] . . . for the breach of which the law gives a remedy."66 The notion of mutuality of consideration narrowed the sweep of legally enforceable contractual obligations. The Restatement (Second) of Contracts "codifies" the requirement of a bargain for exchange: "In modern times the enforcement of bargains . . . is extended to the wholly executory exchange in which promise is exchanged for promise. . . . The promise is enforced by virtue of the fact of bargain, without more."67 Professor Egan explains the reasons for the popularity of the "bargain

62. Id. at 293-94 (emphasis added).
64. Id. § 17(1) (emphasis added); see also id. § 18 (concerning manifestation of mutual assent); id. § 19 (explaining how conduct may be regarded as manifestation of assent); id. § 53(3) (commenting on manifestation of intention not to accept); id. § 57 (explaining that, where notification is required, "[an] offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance" (emphasis added)); id. § 65 cmt. a (making note of the use of a reasonable medium of acceptance); id. § 71 cmt. b ("[T]he law is concerned with the external manifestation rather than the undisclosed mental state.").
65. Id. § 17 cmt. c (emphasis added).
66. Id. § 1.
67. Id. § 75 cmt. a. The sanctity of the bargain concept is tempered by § 90 which allows for the enforcement of "half" of the bargain because of detrimental reliance by another party. Thus, "[a] promise which . . . induce[s an] action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Id. § 90(1). The insertion of this section on "promissory estoppel" evolved during the drafting of the First Restatement. Section 90 was a victory for Professor Corbin, a staunch believer in reliance theory, over his rival, Professor Williston. For an interesting account of this "duel of scholars," see GILMORE, supra note 5, at 57-65.
principle”:

The strict bargain principle of contract law developed in response to the rise of the free market. The bargain principle’s real appeal was its ease of administration. Theorists and courts found that rigid rules applied in an objective manner required a lot less inquiry and thought than attempting to inject equity and fairness into a consensual transaction.68

The concept of mutual assent or the bargain principle of traditional contract law focused primarily on “contractual certainty” regarding contract terms. This notion of certainty is reflected in the notion that an offer and acceptance should be a “mirror image” of one another. Thus, if the terms are not identical, then there could be no finding of contractual intent.69 The ongoing use of the certainty rationale was demonstrated in the 1992 English case of Walford v. Miles.70 “If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognize a contract to negotiate. The reason is that it is too uncertain to have any binding force . . . .”71 In fact, the Willistonian notion that “mutual assent” must be present at the time of contract formation has long faded in importance.72 It is now generally held that such intention to be bound may be implied. It is for the courts to determine based upon the “totality of the circumstances.”73 This more expansive view of contractual intent has

69. The importance of certainty in the rules of contract has long been a rationale given for the formalistic application of those rules. It is this “certainty of rules” with which the legal realist took issue. “Uncertainty is a source of cost and disutility . . . . [A] defining characteristic of legal realism . . . is depreciation of the benefits of rules in reducing uncertainty.” Posner, supra note 29, at 45.
70. 1 All E.R. 453 (1992).
71. Id. at 459 (alteration in original) (quoting Courtney & Fairborn Ltd. v. Tolaini Bros. (Hotel) Ltd., 1 All E.R. 716, 720 (1974)).
72. Traditional contract theory is closely associated with the influential writings of Professor Samuel Williston. Traditional contract theory focuses solely upon whether there was a reaching of “mutual assent” at the time of “contract formation.” Subsequent events are rendered meaningless under this analysis. See 1 Williston, supra note 25, § 22.
73. The implication of intent is a widely accepted prerogative of the courts because the parties “with hindsight . . . will tend to the interpretation that best suits their interests.” Howell Lewis, Letters of Comfort, 139 New L.J. 339, 339 (1989) (discussing the use of contractually ambiguous comfort letters in commercial and financial transactions). Courts will then “objectively” imply or not imply contractual intent based upon the “totality of the circumstances.” One commentator noted, “Courts look to the intent and surrounding circumstances of the parties when forming a contract . . . .” Egan, supra note 68, at 311 (concerning when a court should not apply the parol
been a major development in twentieth-century contract law.

Each theory has met with an even greater number of critiques. This frenzy of intellectual analysis is even more remarkable given the "newness" of this area of law. In fact, the American embodiment of contract law began out of necessity in the late eighteenth century with the "discovery" of manifest destiny. Its corresponding jurisprudence is mostly a product of the nineteenth and twentieth centuries. However, our jurisprudence can be further "legitimatized" by tracing its ancestry to its English roots. Thus, our jurisprudence is one of many step-fathers: Thomas Hobbes, John Locke, David Hume, Jeremy Bentham, John Austin, and John Stuart Mill to name a few.

B. Fuller's Reliance: Opening of Pandora’s Box

Fuller and Perdue’s reliance work is considered a watershed in the enforceability of contractual obligations. The executory exchange of evidence rule).


75. THOMAS HOBBES, LEVIATHAN (London, J.M. Dent & Sons Ltd. 1976) (1651). Hobbes (1588-1679) espoused a political theory advocating a strong, secular government as a means of controlling natural human shortcomings such as selfishness and greed.


78. See, e.g., BENTHAM, supra note 34 (proposing a theory of utilitarianism that all action should be directed toward achieving the greatest good for the greatest number of persons). Jeremy Bentham's (1748-1832) influence on the common law is well recognized: "The general trend [was] in the direction of recognising utility rather than morality as the justification for the enforcement of obligations." PARRY, supra note 4, at 13. Bentham is often associated with the movement toward the codification of law.

79. For John Austin's (1790-1859) best known work, see JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (2d ed. 1970) (1861). Austin is regarded as the father of Anglo-American analytical jurisprudence: "Austin's followers, for example, Holland, Salmon, and Gray, followed suit; and their conclusion is that contracts should be enforced so as to prevent disappointment of well-founded expectations." PARRY, supra note 4, at 14 (footnote omitted).

80. For examples of John Stuart Mill's (1806-1873) work in this area, see JOHN S. MILL, ON LIBERTY, in UTILITARIANISM, ON LIBERTY, AND ESSAY ON BENTHAM 126 (Mary Warnock ed., Penguin Books 1974) (1859); JOHN S. MILL, UTILITARIANISM, in UTILITARIANISM, ON LIBERTY, AND ESSAY ON BENTHAM, supra, at 251 (1863) (characterizing Mill as a disciple of Jeremy Bentham and as the foremost spokesman of liberalism in the nineteenth century).
promises that formed the basis of the bargain principle had now been bifurcated. Only a single promise, expressed or implied, was needed in order to make claim for a remedy. The notion of “mutual assent” or “agreement” had thus been transformed into a fictional character to be recast by those still clinging to the certainty and comfort provided by classical contract. Was a bargained for exchange needed to elicit the benefit of contract remedy? No! Did the promisee have to agree to a specified reciprocal consideration to bind the promisor? No! Thus, a meeting of the minds, subjectively (will theory) or objectively (bargain theory), was a nice element for a judge to base a decision on, but was a pure luxury. Instead, the notion of “justifiable reliance” became the basis to launch the realm of contract remedies into greater reaches of application.81 Promissory estoppel’s dramatic coming out in the First Restatement of Contracts and its triumphant preeminence in the Restatement (Second) of Contracts illuminated Fuller’s achievement and Professor Corbin’s vision.82 A recent commentary illustrates how far contract has come from the days of classical contract’s monolithic reverence for freedom of contract:

One trend in contract law . . . has been to place less emphasis on the distinction between contract and tort law and more emphasis on fairness in contractual relations. The reabsorption of classical contract doctrine into the mainstream of tort is evidence supporting this assertion: courts have slowly eroded classical contract doctrine in order to remedy wrongs and prevent injustices from occurring between private parties. The trend in contract law is to compensate “any detriment reasonably incurred by a plaintiff in reliance on a defendant’s assurances.”83

The Restatement (Second) of Contracts provides plenty of leeway for such an expansive use of detrimental reliance or promissory estoppel.84 It has been used to overcome missing elements, in the traditional contract’s equation, in order to find a contractual obligation; for example, if two parties fail to clearly express contractual intent, a

81. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (noting that this section is often referred to regarding “promissory estoppel”).
82. “Corbin’s abiding interest was in what he called the ‘operative facts’ of cases; he had no love for, indeed little patience with, doctrine.” GILMORE, supra note 5, at 58.
84. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). “A promise which the promisor should reasonably expect to induce action . . . and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise.” Id. § 90(1).
court may imply such intent by finding “reasonable reliance.” The use of equitable doctrines to imply the required intent comes within the realm of what has been referred to as the “new spirit of contract.” This new spirit places less emphasis upon the fictional “presentation” of the formal words of promise associated with classical contract theory. Professor Speidel states the case for the new spirit of contract. “[I]n the search for agreement the court should ascertain the legitimate business aims of the [parties] as supplemented by the ‘customs and expectations of the particular business community.’ The preference is for standards . . . and agreement in fact rather than some limited concept of promise.”

The underlying premise of this new spirit of contract is supported by the belief that the courts should expand their analyses beyond the words of the instrument. This expanded analysis takes into consideration the “equities” of the overall transaction, including how subsequent events may call for an “equitable reformation” of the contract. For example, all contracts should be equitably reformed to include the obligations of “good faith” and “conscientiousness.” Professor Macneil stresses the inability of human beings to reduce into written form pre-contractual negotiations. The result is a distortion of classical contract’s “mutuality of obligation.” The fragmentation of promises between what is subjectively understood and what is presented in the form of contract results in “nonmutuality rang[ing] from subtle to gross differences in understanding.” Professor Macneil argues that the courts need to refer to “tacit assumptions” in determining the enforceability of promises. “Such assumptions may range from general ones such as

85. See id. ¶ 90 cmt. b.
86. See Speidel, supra note 22, at 193 (discussing the district court’s decision, in Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), to reform a contract where the plaintiff would have lost $60 million based on “the court’s sense of fairness”).
87. Professor Macneil examines the concept of presentation in his commentary on the Restatement (Second) of Contracts. See Ian R. Macneil, Restatement (Second) of Contracts and Presentation, 60 VA. L. REV. 589 (1974) (commentary).
88. Speidel, supra note 22, at 199.
89. Id. at 193.
90. See Macneil, supra note 87, at 590-97.
91. MACNEIL, supra note 22, at 9.
92. Id. at 25. The use of these assumptions is more closely associated with what persons “ought to do” as opposed to what they “must legally do.” See FINNIS, supra note 16, at 297-350.
trust to the highly specific, such as assumptions about particular and precise trade usages.93

Professor Fuller’s discussion in “Contracts Imperfect in Expression or in Legal Effect”94 called into question the contract norms that had defined traditional contract law. Unexpected liability premised upon reliance had become the order of the day. Fuller states that “reliance on a contract may remove the objection of indefiniteness” in a prospective contract.95 The rationale to extend contractual liability beyond that which was allowed by the “formalities” of classical contract theory has opened the door to ad hoc inquiry. “[T]he need to reimburse detrimental reliance justifies a court in running a hazard of uncertainty which would otherwise be avoided.”96 The expansion of contractual liability through the doctrine of reliance pre-dated Fuller’s landmark work. The undercurrent of reliance damages had long influenced the common law in various guises. Professor Fuller recognized this fact when he noted that “the reliance interest seems to prefer to travel incognito.”97

The reliance mystique continues to weave its influence in our judicial decisions. The First Circuit, in Chelsea Industries v. Accuray Leasing Corp.,98 imposed a legally binding obligation upon the issuer of a “policy letter” despite its intent not to be bound. The plaintiff in the case had entered into an equipment lease. Subsequently, it requested from the leasing company information as to a purchase option at the expiration of the lease. The leasing company forwarded a letter regarding its “policy” as to the purchase of leased equipment. The court held that the letter became a part of the “total” agreement and was a contractually binding promise. The court’s rationale smacked of reliance theory. “[T]here is a normal assumption that a business transaction is not meaningless and that words have a purpose.”99 The purpose is to induce another into “action or forbearance.”100

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93. MACNEIL, supra note 22, at 25.
95. Id. at 395.
96. Id.
97. Id. at 390.
98. 699 F.2d 58 (1st Cir. 1983).
99. Id. at 60.
100. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).
C. The Death of Contract and the New Spirit of Contract

The easing of the strict bargain principle of contract law has mainly been achieved by a commensurate growth of the equitable doctrines.101 These doctrines have been used to overcome the formal requirements of contract, such as express intent, consideration, infant incapacity, and the Statute of Frauds. The loosening of the grip of the formal requirements of contract has been traced to the rise of promissory estoppel. One commentator states that “[p]romissory estoppel rejects a purely formalist approach and provides a doctrinal rubric by which reliance liability is enforced as to commitments that do not satisfy formal contract law requirements.”102 Professor Charny asserts that formality still plays a role in the enforceability of promises. “The degree of formality with which a promise is articulated may affect its enforceability.”103 However, lack of formality is no longer the death knell of contractual enforceability.

The equitable advance of contract law has been embraced by a number of theoretical schools. The equitable relaxing of formal contract law has been interpreted by “death of contract” theorists as a movement towards tort-like remedies and the absorption of contract into the law of tort.104 The equitable reformation (“new spirit”) of contract law has been viewed by some as the expansion of contract law, and not as its death. The expansion of contract through equitable concepts,105 such as

101. These doctrines include promissory estoppel, waiver, unconscionability, good faith, and fair dealing.


103. Charny, supra note 102, at 455.

104. Some have bifurcated the absorption of contract law into the law of tort and the law of restitution or unjust enrichment. This author classifies the doctrine of unjust enrichment as both a remedy in tort and in contract and, thus, if contract is eliminated, then tort is its proper place. Also, the notion of tort’s absorption of contract as advanced by “death of contract” theorists is not a novel idea. See, e.g., Cohen, supra note 10. Cohen explains:

In emphasizing the element of injury resulting from the breach, the whole question of contract is integrated in the larger realm of obligations, and this tends to put our issues in the right perspective and to correct the misleading artificial distinctions between breach of contract and other civil wrongs or torts.

Id. at 578-79.

unconscionability, promissory estoppel and good faith can be viewed as contract's response to the changing nature of today's exchanges. For example, Professor Macneil attributes the need for an expanded approach to contracts as a response to the growth of relational contracts in comparison to traditional transactional contracts. He poses a response to this phenomenon: "[D]evelop an overall structure of contract law of greater general applicability than now exists and . . . merge both the details and the structure of transactional contract law into that overall contract structure." Others have indicated that the need for expansion was due to the increased standardization of both transactional and relational contracts where mutual consent, subjective or objective, is a fiction. The epitome of the standardization movement is the use of form contracts. The danger of abuse in the use of fine print, one-sided, and unread contract forms is well-documented. The development of limiting principles has been a natural response to rein in the potential for such abuse. Professor Braucher lists the common law limitations of good faith and strict construction as two such principles: "Limiting principles include the duty of good faith [and] construc-

106. Section 2-302 of the Uniform Commercial Code states that "if the court . . . finds the contract or any clause of the contract to have been unconscionable . . . the court may refuse to enforce the contract . . . ." U.C.C. § 2-302(1) (1995); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) ("Unconscionable Contract or Term").

107. Section 1-203 states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1995); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979) ("Duty of Good Faith and Fair Dealing"). It should be noted that "good faith" in contract is not a recent innovation. The concept of good faith has a long tradition in English common law. For example, when one party possesses specialized knowledge, she has a duty to disclose. "These contracts are called contracts uberrimae fidelit ("of the utmost good faith")." PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 323 (12th ed. 1989).

108. See generally Stanley D. Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343 (1969) (discussing the evolution of promissory estoppel, whose principal application is no longer limited to gratuitous promises but is now being applied in a business setting); Charles L. Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 COLUM. L. REV. 52 (1981) (discussing how the Restatement (Second) of Contracts' drafters have responded to the burgeoning application of promissory estoppel and how the reliance principle influenced the Restatement scheme as a whole).


110. The concept of strict construction against the drafter can be found throughout Anglo-American jurisprudence in both statutory and non-statutory interpretations. The English refer to this concept as the contra proferentum rule, which states that, in a case where there is an "ambiguous provision," the questions surrounding the ambiguous provision are resolved by construing strictly [the provision] against the drafter." Michael G. Patrizio, Fables of Construction: The Sophisticated Policyholder Defense, 79 ILL. B.J. 234, 234 (1991); see also RESTATEMENT (SECOND) OF CONTRACT § 206 (1979) ("Interpretation Against the Draftsman").
tion against the draftsman."

The movement toward "limiting principles" in contract law, in an effort to reach equitable resolutions, has profound ramifications for the classical theory's fundamental premise of "freedom of contract." Whether these limiting principles and the resultant remedies are to be labeled as tort-like or as a "new spirit" of contract will continue to be debated. What is clear is that this movement further expands the anti-formalism approach to contracts. The "private law" formulated in a contract has been somewhat replaced by an equitable reformation based upon community norms and standards. Professor Macneil refers to these common norms as the "linking" norms of restitution, reliance, and expectation. "These linking functions... put the restitution, reliance, and expectation interests in a central position in analyzing contractual behavior and rules."

The practical effect of this incursion of equity into contract law is further incentive for ad hoc inquiry with an increased focus on justice and fairness. The loser in this scenario is the approach of contract as doctrine, requiring application somewhat formally under the banners of generality of law, and the resulting benefits of predictability and certainty. Professor Langdell's "riot of doctrine" has been duly suppressed. In its place we have an approach more malleable to the myriad of fact patterns found in modern commercial transactions.

One commentator states that "[l]ike two other grand principles, articulated in the U.C.C. and adopted by the drafters of the Restatement—'good faith' and 'unconscionability'—'promissory estoppel' states a principle of abstract justice capable of application in an infinite variety of factual

112. Lon Fuller recognized this "modern tendency toward 'informality.'" Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 822 (1941) (emphasis added).
113. MACNEIL, supra note 22, at 55.
114. POSNER, supra note 29, at 44.
115. See GILMORE, supra note 5, at 97-98.
116. Professor Speidel's analysis of the infamous ALCOA case reflects a classic example of a court's equitable formation of a contract. What makes the court's reasoning more remarkable is the court's forwardness in applying the "new spirit" of contract by focusing on a number of non-contract factors: "(1) the legitimate business aims of the parties as supplemented by the 'customs and expectations of the... business community'; (2) their purpose of 'avoiding the risks of great losses'; and (3) the need to frame a remedy to preserve the essence of the agreement." Speidel, supra note 22, at 193 (citing Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 89-93 (W.D. Pa. 1980)).
situations." The rigid application of rules has increasingly faded from the jurisprudential landscape. In reality, the formalistic application of contract doctrine began its demise with the extinction of the writ system and the creation of contract as a general remedy of law. The rigidity of the rules were soon filled with numerous exceptions. At times, these exceptions were usually more applicable than the so-called general rules. The multi-jurisdictional nature of the American court system has made the notion of a uniform common law an imprecise facsimile at best. Instead we have become a nation of minority views. Ad hocery has long been a significant feature of our judicial landscape.

1. Promissory Estoppel: Part Deux

The highly influential impact of promissory estoppel upon contract doctrine warrants a further look. The principle, although not the term, can be found in section 90 of the *Restatement (Second) of Contracts*. It is the embodiment of a combination of Fuller’s reliance doctrine with Corbin’s vision. The vision was that the narrowness of classical contract’s consideration requirement was no longer sufficient to monitor the remedial purpose of contract law. “[M]any judges . . . were not prepared to look with stony-eyed indifference on the plight of a plaintiff who had, to his detriment, relied on a defendant’s assurances without the protection of a formal contract.” The law of contract had to be made more flexible in order to service the increased variety and complexity of the disputes engendered by modern transactional and relational exchanges. Section 90 provides for the enforcement of a

118. Judge Posner notes that the “widely perceived decline . . . of legal formalism” may be traced to “a historical shift in the balance between rules and standards, in favor of the latter.” POSNER, supra note 29, at 45.
119. “Each of these [rules] almost immediately generated an almost infinite number of exceptions to what was still proclaimed to be the ‘general rule.’” GILMORE, supra note 5, at 76; see also POSNER, supra note 29, at 44 (“Rules create pressure for ad hoc exceptions, but standards could be thought the very institutionalization of the ad hoc exception.”).
120. One may argue that statutory preemption has been the exception to the fragmentation of the law. Two examples are most apparent: the almost universal enactment of the Uniform Commercial Code and the increased federal preemption in a host of areas including consumer transactions, financial transactions, and environmental liability. However, the gloss of uniformity should not blind us to the fact that such uniform law is subject to the interpretive anomalies inherent in the different court systems.
121. The first comment notes that “[t]his Section is often referred to in terms of ‘promissory estoppel.’” *Restatement (Second) of Contracts* § 90 cmt. a (1979).
122. GILMORE, supra note 5, at 63-64.
promise that may not have been bargained for or may not have involved traditional consideration. In doing so, section 90 furnishes a tripartite test for a finding of contractual liability. First, the promisor "reasonably expect[s] to induce action or forbearance." Second, the promise "does induce such action or forbearance." Third, "injustice can be avoided only by enforcement of the promise."

Thus, the flexibility of approach envisioned by Corbin is achieved. But, by what principles are courts to be guided in finding and preventing injustice? What normative values or principles of contract or non-contract should be sought to limit the uncertainty that such flexibility often entails? The comments provide some guidance: "This Section states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains." What is this basic principle that allows for the expansion of the contractual umbrella? We will return to this question later in this Article. The quantification of a "basic principle" leads to some further questions. Is reliance still within the realm of contractual promise? Or, have we crossed the line into the injury centered universe of non-contract?

Comment b to section 90 attempts to narrow the limits of the

123. Restatement (Second) of Contracts § 90 (1979). In the area of charitable subscriptions and marriage settlements, § 90 allows for enforcement even absent a finding that the promise induced an action or forbearance. Id. § 90(2). Some courts have interpreted this section to allow for the treatment of charitable subscriptions "as a sui generis category requiring neither consideration nor reliance." Id. § 90 cmt. f (emphasis added) (reporter's note); see Salisbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974) (noting that "a charitable subscription is enforceable without consideration and without detrimental reliance"). But see Jordan v. Mount Sinai Hosp., Inc., 276 So. 2d 102, 108 (Fla. Dist. Ct. App. 1973), aff'd, 290 So. 2d 484 (Fla. 1974) ("Courts should act with restraint in respect to the public policy arguments endeavoring to sustain a mere charitable subscription. To ascribe consideration where there is none, or to adopt any other theory which affords charities a different legal rationale than other entities, is to approve fiction."). Can the frontier of contract law be expanded any further? Is a promise lacking consideration or reliance still within the purview of contracts?

124. The Restatement acknowledges the similarity of this principle to those principles found in negligence, in misrepresentation (doctrine of estoppel) and in restitution. Restatement (Second) of Contracts § 90 cmt. a (1979). However, the Restatement makes clear that promissory estoppel is a remedy in contract. "A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate." Id. § 90 cmt. d.

125. Id. § 90(1).
126. Id.
127. Id.
128. See supra text accompanying notes 67, 121-27.
129. Restatement (Second) of Contracts § 90 cmt. a (1979).
130. See discussion infra part III.B-D.
promissory estoppel rationale's infinite number of possible applications. The focus seems to be the acknowledgement of certain limiting norms in order to rein in section 90's potential sweep. These norms are centered around the vagueness of the third requirement for liability, the prevention of "injustice." A finding of injustice may depend "on the formality with which the promise is made, on the extent to which evidentiary, cautionary, deterrent and channeling functions of form are met . . . and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant." Professor Fuller, in his often cited work *Form and Consideration*, examines the functions served by contractual formality. They serve an "evidentiary function," a "cautionary function," and a "channeling function."

The channeling function allows the businessperson to communicate her objectives and thoughts by way of legally "defined and recognizable channels." It is argued that the greater the formality of a transaction, the easier will be the "judge['s] . . . inquiry whether a legal transaction was intended."

Thus, the "confining norms" of contract are intended to be relaxed but not dismantled. From the beginning, the notion that reliance or promissory estoppel could co-exist with the bargain principle was made clear by Fuller. His rationale was simply that the same policies which support recovery for "bargained for promises" also support "promises which induce" another to act. Fuller acknowledges that "the complex of policies which dictates a judicial protection of the expectation interest is  

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132. Fuller, *supra* note 112.
133. *Id.* at 800. Fuller's example is the Roman *stipulatio* which entailed "an oral spelling out of the promise . . . to impress its terms on participants and possible bystanders." *Id.*
134. *Id.* (noting that this function serves as a "deterrent . . . by acting as a check against inconsiderate action"). The common law seal served such a purpose as a "symbol in the popular mind of legalism and weightiness." *Id.*
135. *Id.* at 802. Examples of legally recognizable channels are the legal instruments of the day, such as a mortgage, a guaranty, a deed, a purchase contract, and a promissory note. The functions of legal formalities have been recognized in the *Second Restatement*:

Four principal functions have been identified which legal formalities . . . may serve: the *evidentiary* function, to provide evidence of the existence and terms of the contract; the *cautionary* function, to guard the promisor against ill-considered action; the *deterrent* function, to discourage transactions of doubtful utility; and the *channeling* . . . function, to distinguish a particular type of transaction from other types and from . . . exploratory expressions of intention . . . .

*Restatement (Second) of Contracts* § 72 cmt. c (1979).
136. Fuller, *supra* note 112, at 801 (emphasis omitted) (quoting IHERING, II GEIST DES ROMISCHEN RECHTS 494 (8th ed. 1923)).
strongest in the case of a promise which forms part of a bargain."137

Reliance recovery was intended to supplement and not to replace. The
old formalities may be replaced with new ones, but some degree of
formality will continue to have a place in contract. "The desiderata
underlying the use of formalities will retain their relevance as long as
men make promises to one another."138

It seems clear that the adoption of reliance as a basis of recovery
was not intended to move contract within the realm of tort. Rather, it is
more a shifting of contractual liability from that of purely "bargained for
exchange" to one of nonmutuality, where inducement, not reciprocity, is
the triggering device. But, the basic cause of action is still based on
"promise" and involves matters of a contractual nature. In regards to the
former point, Professor Fuller explains that section 90 provides, in effect,
that "serious reliance may under some circumstances make 'binding' a
promise for which nothing has been given or promised in exchange."139

As to the contractual nature of the reliance in question, one commentator
notes that the "reliance-protecting policy" does "no more than indicate
the current high-water mark of reliance theory being applied in contract
cases."140 The fact that reliance can be found in other realms141 does
not mean it cannot also be applied in contract without affecting the
essential contractual nature of the cause of action. It may be simply an
attempt to adjust contract theory to the changing nature of contract. The
need to augment the bargain principle with reliance and equitable
principles may be attributed to the development of more complex forms
of pre-contractual negotiations142 and of contractual agreements:

The [equitable] doctrines . . . place limits on the freedom of contract
because "[c]lassical contract doctrine was developed for cases of
discrete, one-shot transactions, but it [is] a poor fit for complex,
long-term contracts . . . ." The complexity of most modern agreements
insures that such agreements will rarely be fully completed. Therefore,
anyone attempting to enforce an agreement is likely to encounter one

137. Fuller & Perdue, supra note 94, at 373.
138. Fuller, supra note 112, at 822-23.
139. Fuller & Perdue, supra note 94, at 401 (emphasis added).
141. See, e.g., RESTATEMENT (SECOND) OF TORTS § 552 (1976). Recovery for misinformation
or misrepresentation can be sought against someone who "through reliance upon it in a transaction
[intended] the information to influence." Id. § 552(2)(b); see also 12 WILLISTON, supra note 25,
§ 1509, at 455-56.
142. See, e.g., E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair
Despite promissory estoppel’s doctrinal importance, its place in the judicial mind-set is still to be determined. Its scholarly acceptance should ensure that it will remain an alternative tool that can be used by a judge. For example, the court in *Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp.* used promissory estoppel rationale to uphold a claim of an independent purchasing agent. The defendant, while in the process of bargaining for a construction contract, forwarded a comfort letter appointing the plaintiff as its purchasing agent and informing it of the prospective construction project. Based upon this “comfort letter,” the plaintiff began to make purchases on behalf of the defendant. A formalized contract was never consummated. The court, nonetheless, held the defendant liable because it “clearly had knowledge of the special circumstances producing damages” and because, as the lower court had also concluded, the plaintiff “had relied on the ‘comfort letter.’”

### D. Efficiency and Economics

A number of “non-traditional” approaches have been presented to explain how contract law could better work to maximize benefits to society as a whole. These approaches can be understood through the time proven philosophical dichotomy represented by the deontological-teleological schools of thought. Instead of looking to the

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143. Egan, supra note 68, at 312 (alterations in original) (footnote omitted) (quoting KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 321 (1990)).

144. See, e.g., Knapp, supra note 108, at 53 (explaining that promissory estoppel “has become perhaps the most . . . expansive development of this century in the law of promissory liability”). A recent study seems to indicate otherwise. “Courts’ extreme reluctance to grant recovery under promissory estoppel indicates a continued adherence to traditional contract principles of bargained-for exchange.” Phuong N. Pham, Note, The Waning of Promissory Estoppel, 79 CORNELL L. REV. 1263, 1264 (1994). In concluding, the author states:

[C]ourts show extreme reluctance to deviate from traditional contract principles. Contrary to assertions that promissory estoppel has become a primary, independent theory of obligation, the doctrine has remained an inferior doctrine of last resort. . . . Despite the claims of death-of-contract scholars, the waning of promissory estoppel provides evidence of the enduring vitality of traditional bargain theory.

*Id.* at 1290.

145. 769 F.2d 1076 (5th Cir. 1985), cert. denied, 475 U.S. 1047, and cert. denied, 476 U.S. 1104 (1986).

146. See generally DiMatteo & Sacasas, supra note 33, at 422 n.376.

147. *Id.* at 1080.

148. *Id.* at 1079.
morality of keeping one’s promises or to the enforcement of contract as the confirmation of free will, the consequentialist mind-set looks to the effects of a decision as its guiding light. Contract law is to be viewed as an “instrument” to forward societal goals. This instrumentalist concept holds that “contract rules must be evaluated and understood, not as instances of the general principle of free will, but in terms of their consequences.”

In the words of utilitarianism, a decision is just if it results in a “net benefit” to society.

This type of analysis is advocated under what is often referred to as an efficiency, or a law and economics, theory of contract. This economic analysis can be used both analytically and normatively. Analytically, it may be argued that “utility” calculations are the foundations of common law rules and doctrines. In short, most rules are historically premised on the notion of the “greater good.”

Normatively, economics or utility calculations should be utilized to render decisions that will result in the greater good for society. The “greater good” goal of contract law can be framed in the Kaldor-Hicks model of economics. Courts should strive for decisions that fulfill the Kaldor-Hicks criterion. The effects of a decision should result in an “aggregate gain . . . larger than the aggregate loss.”

Judge Richard Posner proposes a reappraisal of Holmes’s “prediction theory” of the law, along with a need for constant critical inquiry of the rules and beliefs of law. Precedent should assist, not truncate, critical inquiry. “Systems of thought that emphasize hierarchy, tradition, authority, and precedent disvalue the kind of critical inquiry


150. Efficiency has long been an underlying norm of many of contracts’ foundational premises. For example, the “reasonable person principle” is based on the notion of what a reasonably prudent, efficient person would have done in a given situation; hopefully, something that would satisfy the efficiency norm. “[E]veryone [is] held to the standard of that rational, efficient, ‘reasonable’ person.” Speidel, supra note 22, at 197 (emphasis added). “Both the party and the judge, in presenting and hearing the case, invoke the reasonable person as the shared standard of judgement.” Note, Sympathy as a Legal Structure, 105 Harv. L. Rev. 1961, 1970 (1992) (emphasis added).


that tests belief and advances knowledge . . . .”153 One attempt at such
an inquiry into the predictive nature of the law is the use of economics
“to improve our understanding of law and assist in its reform.”154 In
short, it is possible “that legal outcomes can be made determinate by
methods of analysis that owe nothing to legal training or experi-
ence.”155 One way is to analyze the likely consequences of an action
or decision. Jurisprudence that continuously extends historical doctrine
through creative interpretations is inferior to that which attempts, through
consequential analysis, to shape the future. The starting point, and
perceived goals, of this teleological jurisprudence is quite different from
those found in traditional will, bargain, or consent theories of con-
tract.156 The starting point of the traditional theories is the focus upon
the fictional intent of the promisor or the reliance of the promisee. It is
also the fitting of existing rules and doctrines to the case at bar. For
those concerned with efficiency, the starting point is in the future with
a focus upon likely consequences. The goals of contract law also take on
different slants. For the traditionalist, the goal is to achieve a “demon-
strably right”157 decision with a logical application of the “rule-of-law”
as the litmus test of rightness. For the consequentialist, the goal of the
judge is to achieve a “reasonable result”158 from an efficiency or “net
benefit” perspective. Rules should not be propagated and retained solely
for purposes of certainty and stability. Instead, rules should continuously
be reassessed as means or instruments to achieve societal effects.159

A number of criticisms of this approach should be considered. First,
efficiency is only one of a number of goals in any system of contract
law.160 Other goals often considered as being within the purview of
contract law include certainty of contract,161 predictability,162 morali-
ty,163 fairness,164 and justice.165 The efficiency “norm” likely plays

153. POSNER, supra note 29, at 82.
154. Id. at 63.
155. Id. at 37.
156. See id. at 28-31.
157. See id. at 26. “Law . . . is concerned not only with getting the result right but also with
stability, to which it will frequently sacrifice substantive justice.” Id. at 51.
158. Id. at 26.
159. Id. at 29.
160. “Efficiency notions alone . . . cannot completely explain why certain commitments should
be enforced unless it is further shown that economic efficiency is the exclusive goal of a legal
order.” Barnett, supra note 25, at 283.
161. See supra notes 69, 72, 144 and accompanying text; see also infra part IV.A.1.
162. See infra part IV.A.1.
163. See supra notes 58-60 and accompanying text.
a part in judicial decision-making, but it is an unlikely suitor for an overarching theory of contract. Second, the valuation of the "gains and losses" resulting from a contract rule or decision are likely to be inexact. Efficiency, like other "standards-based theories,"\textsuperscript{166} suffers from the nonworkability of calculations dependent upon normative evaluation. How does one evaluate the net benefits or costs to fairness, justice, efficiency, or "wealth maximization"?\textsuperscript{167} It is a problem analogous to the implication of intent at the formation of a contract in classical contract law. "No human mind can know all the causes effecting results in any complex sequence of events. Because of limitations on knowledge of causes and effects, our ability to presentiate is always a limited one."\textsuperscript{166} Furthermore, the law and economics model's workability is likely to suffer as one moves from the transactional-type of contract to relational-types. Professor Macneil has noted that many contractual concepts may not work as efficiently in these types of contracts.\textsuperscript{169} One may argue that economic, or efficiency, theory is likely to function better in analyzing discrete, transactional exchanges as compared to long-term relational agreements. For example, at the "extreme transactional pole," the subject matter is a "[s]imple, monetizable economic [type of] exchange."\textsuperscript{170} At the "extreme relational pole," the subject matter includes "complex personal noneconomic satisfactions."\textsuperscript{171} The increased duration and complexity of many of today's relational contracts makes efficiency valuations all the more difficult.

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\textsuperscript{164} See supra notes 101, 105-08; see also infra note 449 and accompanying text.
\textsuperscript{165} See supra notes 19, 67; see also infra note 235 and accompanying text.
\textsuperscript{166} For a discussion concerning the notion of "standards-based theories," see Barnett, supra note 25, at 277-86.
\textsuperscript{168} Macneil, supra note 87, at 590 (footnote omitted).
\textsuperscript{170} Id. at 738.
\textsuperscript{171} Id. In the area of the assignability or transferability of contracts, Professor Macneil notes that "[t]ransfer [is] likely to be uneconomic and difficult to achieve even when it is not impossible." Id. at 740.
E. The Fairness Inquiry

Various theories have been posed to explain the "gaps and gores" inherent in the will and bargain theories of contract. For example, Fuller explains the fear behind increased formality in contract and the unlikely import of the now deceased Uniform Written Obligations Act. Such formalized and standardized approaches to contract result in "increased embarrassment to the task of judges seeking a way to let a man off from an oppressive bargain without seeming to repudiate the prevailing philosophy of free contract." Fuller was right on both scores. Despite the success of the Uniform Commercial Code, standardization of contract and uniformity of decision has not been the order of the day. The idea of "judicial embarrassment" represents the notion that the judicial mind-set is clouded with numerous concerns other than the objective application of contract doctrine. These "other concerns" have been widely theorized upon. The result has been the production of extensive literature enumerating various judicial concerns and values such as justice, efficiency, fairness, and sympathy. Most of the literature is more recent pontifications of earlier attempts at devising

172. A gore in "old English law [is] a small, narrow slip of ground. . . . In modern land law, a small triangular piece of land, such as may be left between [adjacent] surveys which do not close." BLACK'S LAW DICTIONARY 695 (6th ed. 1990).
173. Fuller, supra note 112, at 823.
174. See, e.g., Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 IOWA L. REV. 769 (1985). Rosenfeld notes: The justice of a contract between two individuals is due either to the fact that they reached a genuine agreement or to the actual terms of their agreement. In the former case, contract can be said to be intrinsically just; in the latter case, it can be said to be just for extrinsic reasons, that is, its terms have been determined to be fair under some independent criterion of justice. Id. at 771-72 (footnote omitted).
175. See generally POSNER, supra note 29 (equating efficiency concepts with wealth maximization); Note, Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics, 97 HARV. L. REV. 978 (1984) (highlighting efficiency analysis as one of the most influential and often written about methods of mainstream legal literature).
176. See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1826 (1980) ("[T]he freedom of contract slogan no longer insulates a transaction from minimum demands of fairness, reasonable behavior, and consistency with important policies."); See generally Atiyah, supra note 23 (suggesting that courts often incorporate substantive fairness analysis into consideration in modern contract law); Edward A. Harris, Note, Fighting Philosophical Anarchism with Fairness: The Moral Claims of Law in the Liberal State, 91 COLUM. L. REV. 919, 944-59 (1991).
177. See generally Note, supra note 150 (addressing the importance of sympathy in the legal process).
an overarching principle to explain the mystical innerworkings of the judicial mind. Any background analysis of contract theory would be amiss without a look at these different constructs.

The theories of contract previously discussed have left their imprints upon our current judicial mind-sets. Normative values continue to be drawn from the underlying rationales of the moral sanctity of promise, of enforcing the will of the parties, of allowing the private parties to valuate the benefits of their bargains, and for compensating reliance's injury. These rationales are facades behind which lie the values and norms that provide the real impetus for the implementation and the creation of law. "The demand for justice behind the law is but an elaboration of such feelings of what is fair and unfair." The notions of efficiency or economics, fairness, and justice may be tied together with the notion that the courts do inquire into the effects of their decisions and that inquiry is likely to impact upon their "reading of the law." Professor Summers states that "(t)he law is not a mere formal receptacle. It includes substantive content." Another commentator states, "Courts and scholars often focus[] on the policy of protecting freedom of contract. In so doing, they ignore competing policies . . . . These policies include promoting . . . justice and fairness in social relations . . . . In sanctifying the principle of freedom of contract,

178. See, e.g., Cohen, supra note 10 (reviewing the "basis of contract" and enumerating upon the "economic basis for contractualism"). "[A] regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a nation." Id. at 562-63. Thus, the doctrine of natural selection can be applied to the law "as a virtue in the Nietzschean [sense]: Let the weak perish that the strong may survive." Id. at 563.

179. See infra part IV.A.3.

180. See infra part IV.A.4.

181. See infra part IV.A.4.

182. See infra part IV.C. The notion that fundamental human values remain at the core of most of our contract theories was aptly espoused by Cohen. "[T]o base the obligation of the promise on the injury of the one who has relied on it, is to appeal to something really fundamental." Cohen, supra note 10, at 578 (emphasis added) (reliance theory). "Popular sentiment generally favors the enforcement of those promises which involve some quid pro quo . . . . The parties to the contract must themselves determine what is fair." Id. at 580, 581 (bargain theory). "According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect." Id. at 575 (emphasis added) (will theory). "[P]romises are sacred per se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this." Id. at 571 (second emphasis added) (promise theory).

183. Cohen, supra note 10, at 581. "When courts . . . proceed to interpret the terms of the contract they are generally not merely seeking to discover the actual past meanings . . . but more generally they decide the "equities," the rights and obligations of the parties . . . ." Id. at 577.

184. Summers, supra note 20, at 875.
courts and scholars oversimplify the norms of contract law.” It is to the “law’s normative nature” that we now turn.

To this point, the primacy of the discourse has been the sanctity of contract. In its most “pure” form (bilateral, executory), we may define it as the “sanctity of the exchange.” The sanctity of the exchange is reflected in the fact that our business system, along with its legal support structure, highly values the keeping of one’s promises in an exchange. It is now time to turn to a corollary issue. Is the full judicial enforcement of the promises in an exchange affected or modified by an underlying notion of the “fairness of the exchange”? Equally important, should the notion of fairness or justice have a role in the judicial mindset and the enforcement of contractual promises? The answer for some is a grudging acceptance that fairness considerations are an inevitable part of the judicial mindset. Doctrinal formalism has been no match for human nature’s inclination towards fairness and justice. Despite the rationalizations embodied in “freedom of contract,” the courts have rescued many parties from their own devices. A review of the case law illustrates that courts have viewed fact situations involving a “bad bargain”

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186. Summers, supra note 20, at 947.
187. In the words of St. Thomas Aquinas: “[T]here is in man an appetite for the good of his nature as rational, and this is proper to him, for instance, that he should know truths . . . about living in society.” 28 Aquinas, supra note 16, at 83 (emphasis added) (footnote omitted); see also Vermeesch & Lindgren, supra note 17, at 615-16 (noting Aquinas’s reflections regarding the “inclinations” of man to be rational).
188. The “freedom of contract”-“fairness inquiry” debate can be framed in terms of the difference between “rules” and “standards”:

[A] standard-oriented view might say we should examine contracts ad hoc and enforce only those judged to involve a fair exchange. The rules position might criticize the standards position as involving too much arbitrary discretion on the question of fairness. To avoid the quagmire of the fairness inquiry, we should simply follow the rule: enforce all contracts freely entered. Enforcement of the rule, however, requires asking which contracts have been freely entered. . . . [I]mplementation of the rule, therefore, involves a circular return to a standard-like fairness inquiry . . . .


189. The unfairness of the bargain is viewed here as a valuation of the bargain or exchange at the time of the court’s decision. In short, can undue hardship be avoided by a decision not to fully enforce the contract or promise given by the promisee? This is opposed to the general view that the reasonableness of the terms of a contract or the bargain itself is to be judged at the “time of
differently than those involving relative “equality of consideration.” However, often the underlying “economics” or “fairness” of the bargain is shrouded by the courts in the garb of common law doctrine. The purpose of this analysis is to see if the rationales of fairness can be distilled from the fact patterns and expressed rationales of the cases.

The courts have long attempted to mitigate the demands of applying “rules of law” with concerns for fairness. In Carnival Cruise Lines, Inc. v. Shute, the Supreme Court recognized the need for a “fundamental fairness” inquiry when reviewing clauses in a standard form contract. “It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.”

190. The Restatement (Second) of Contracts does not require “equality or near-equality” of consideration. In fact, it states that sometimes the mere existence of consideration is sufficient to make a promise legally binding. Id. § 17 cmt. d. In a free market economy, it is left to the parties to evaluate the sufficiency of the consideration being given and received. For the purpose of finding a contract, the courts are primarily concerned with the “element of exchange.” Id. But, despite the general judicial discourse against the notion of a “fairness of bargain” element, one can find evidence that courts do view cases of inequality of consideration in the exchange in a different light. Furthermore, one may imply a “fairness of consideration” element from different provisions of the Restatement. The notion of “sufficiency of consideration,” although expressly deleted from the Second Restatement, is clearly there in spirit. See, e.g., id.; id. § 71 cmt. a. Nominal consideration, or a recital of consideration, is deemed insufficient. “[A] mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal.” Id. § 71 cmt. b. See generally Note, Restatement of Contracts (Second)—A Rejection of Nominal Consideration?, 1 VAL. U. L. REV. 102 (1966). The Restatement recognizes that, in most bargains involving goods, “the values exchanged are often roughly or exactly equivalent by standards independent of the particular bargain.” RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. a (1979). However, it later rationalizes that it is not for the courts to review the value of the consideration exchanged because “in many situations there is no reliable external standard of value . . . . Valuation [therefore] is left to private action . . . .” Id. § 79 cmt. c. One may argue that, today, most exchanges of goods and services are relatively fungible. Also, it can be argued that in the age of expert witnesses, professional appraisers, increased standardization, and the proliferation of professional and nonprofessional standards and associations, the existence of “no reliable external standards” is a rare exception. Thus, the courts do have the tools to calculate or estimate the relative equality of consideration if they were so inclined.

191. 499 U.S. 585 (1991); see also Dempsey v. Norwegian Cruise Line, 972 F.2d 998, 999 (9th Cir. 1992) (adopting the Court’s approach, in examining the provision in question, “to determine if it was unreasonable or fundamentally unfair”); Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768 (D.C. Cir. 1992) (noting that a clause would be invalid if it was “unreasonable and unjust”).

192. Carnival Cruise Lines, 499 U.S. at 595 (emphasis added); see also ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961) (collective bargaining agreements); Lewis
One hundred years earlier, the Supreme Court had laid down the groundwork for today's more overt fairness inquiry:

The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. [However, we do not intend to say that the court will never pay any attention to hardships produced by a change of circumstances . . . .]^{193}

In fact, prior to the nineteenth century, "a legally enforceable contract had to be fair."^{194} The modification of the bargain principle, and its underlying rationale of freedom of contract, by the notion of fairness can be seen as a partial return to contracts' primal beginnings. One can argue that the fairness inquiry bolsters judicial impartiality. "There is, moreover, a fairness question: why should the interests of the party who gains from enforcement [of a contract] be advanced at the expense of the reluctant party?"^{195} A fairness inquiry into the terms of a contract, and judicial enforcement of those terms, may be intimated from the Restatement (Second) of Contracts. Section 364, "Effect of Unfairness," lays down the ground rules for a court's denial of equitable relief in the enforcement of an "unfair" contract.^{196} "Specific performance or an injunction will be refused if such relief would be unfair . . . ."^{197} Three grounds of unfairness are enumerated: (1) if a contract is "induced by . . . unfair practices";^{198} (2) if granting such relief "would cause
unreasonable hardship",199 or (3) if the "exchange is grossly inadequate or the terms of the contract are otherwise unfair."200 A number of arguments may be posed that such a fairness inquiry should be, and at times is, performed when determining remedies available at law. First, the historical division of law and equity has been abrogated in almost every other sense.201 If the unfairness of an exchange can be a ground for denying equitable relief, then it should be a ground for the denial or reduction of damages. Second, the notion that "unfairness in the exchange" is almost always the result of mistake or fraud is an illusion. Parties enter into one-sided and subsequently unfair contracts for numerous reasons. The reasons include lack of sophistication,202 the use of standard or form agreements prepared by one of the parties,203 unequal bargaining positions,204 and imprudent judgment. The courts have come to the rescue under a number of guises, including the implication of contract terms,205 the denial of specific performance, and

199. Id. § 364(1)(b).
200. Id. § 364(1)(c) (emphasis added).
201. There has been a "contraction of the area in which [the] traditional distinction is made between the availability of equitable and legal relief." Id. § 364 cmt. a.
202. For a comparative analysis, see Ronald L. Hersberger, Contracts of Adhesion Under the Louisiana Civil Code, 43 LA. L. REV. 1 (1982). "The Civil Code . . . has been applied in Louisiana under a dual standard . . . whereby the formation and enforceability of a contract may depend . . . on the level of sophistication of the buyer . . . ." Id. at 16 (emphasis added) (footnote omitted).
203. See generally Rakoff, supra note 19 (noting that form contracts with boilerplate language should be considered presumptively unenforceable).
204. Compare RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. a, d (1979) (noting that the determination whether a contract is unconscionable due to unequal bargaining positions looks to a showing of "gross inequality of bargaining power" coupled with terms which "unreasonably" favor the stronger party) with id. § 211 cmt. c (explaining that in standardized form agreements, individuals normally do not inspect the terms and, "[a]part from governmental regulation, standard terms imposed by one party are enforced").
205. The "gap filling" provisions of the Uniform Commercial Code allow a court to imply a number of specific terms using reasonableness as its guide. See U.C.C. § 2-305 (1995) ("Open Price Term"); id. § 2-308 ("Absence of Specified Place for Delivery"); id. § 2-309 ("Absence of Specific Time Provisions"). More importantly, for the notion of fairness of exchange, see id. § 1-203 ("Obligation of Good Faith"); id. § 2-302 ("Unconscionable Contract or Clause").
the expansion of the notions of unconscionability,\textsuperscript{206} good faith,\textsuperscript{207} and fair dealing.\textsuperscript{208}

If the doctrines of unconscionability and good faith are further expanded,\textsuperscript{209} then it may be argued that the demarcation between the two and "simple unfairness" will be meaningless. Thus, the fairness inquiry will be the order of the day, resulting with the exorcism of contract's indifference to the "adequacy of consideration."\textsuperscript{210} The courts will have more freedom to "reform" bad bargains and to equalize the "overall imbalance"\textsuperscript{211} between the contracting parties. The equitable adage found in section 364 on the "effect of unfairness" would be set loose upon the general enforceability of contracts. The ruling of \textit{Campbell Soup Co. v. Wentz}\textsuperscript{212} would no longer be confined to the law of equity. A contract enforceable in form may, nonetheless, be denied full legal enforcement if "the sum total of its provisions drives too hard a bargain for a court of conscience to assist."\textsuperscript{213} One may further argue that the enforcement of "unfair" contracts runs contrary to public policy and should, accordingly, be disregarded. "Historically, the public policies against enforcement of terms were developed by judges . . . on the basis of their own perception of the need to protect some aspect of the public welfare."\textsuperscript{214} An example of such a policy is the judicial preference to narrowly construe covenants not-to-compete and to modify or void terms which they view as "unfair."\textsuperscript{215} One may argue that this judicial

\begin{thebibliography}{99}
\item \textsuperscript{208} See \textit{Restatement (Second) of Contracts} § 205 (1979).
\item \textsuperscript{210} \textit{Restatement (Second) of Contracts} § 79 (1979).
\item \textsuperscript{211} Id. § 208 cmt. c.
\item \textsuperscript{212} 172 F.2d 80 (3d Cir. 1948).
\item \textsuperscript{213} Id. at 84.
\item \textsuperscript{214} \textit{Restatement (Second) of Contracts} § 179 cmt. a (1979).
\item \textsuperscript{215} See, e.g., Loblaw, Inc. v. Warren Plaza, Inc., 127 N.E.2d 754, 760 (Ohio 1955) (construing strictly the vague term "demised premises" against the limitations upon land use and, thus, against the lessor (drafter)).
\end{thebibliography}
doctrine of “public policy” could be used by courts to limit the enforcement of unfair contract terms. Comment a of section 179 of the Restatement (Second) acknowledges that this judicial principle is “an open-ended one that does not purport to exhaust the categories of recognized public policies.”216

Professor Atiyah states the generally held premise that “the traditional dogma of contract law [is] that the adequacy of the consideration is immaterial to the validity of a contract . . . . There is simply no room for any inquiry into the fairness of the exchange.”217 He then recites numerous examples of how the law has dealt with fact-specific cases of substantive unfairness: illusory contracts, option contracts, requirement and output contracts,218 and the “defences of fraud, misrepresentation, and duress and undue influence; . . . mistake and even frustration,”219 along with the law of penalties and, finally, “the huge growth of statutory interventions in contract law, much of which is quite avowedly designed to ensure substantive fairness in exchange.”220 These are the ways in which the courts have overtly dealt with certain situations of substantive unfairness. More generally, the courts have utilized the devices of implication, construction, and interpretation to deal with the issue of fairness in the exchange.221 There has been a long running “covert operation” involving the weaving of intricate webs of exceptions and fictions222 to avoid the harsh results incumbent upon a body of law steeped in formalism and dogma.223

216. Restatement (Second) of Contracts § 179 cmt. a (1979); see also id. § 78 (“Voidable and Unenforceable Promises”); id. § 207 (“Interpretation Favoring the Public”); id. § 365 (“Effect of Public Policy”).


218. See id. at 7, 8.

219. Id. at 2.

220. Id. at 3. Some examples of U.C.C. implied provisions include: implied warranties of merchantability and fitness for a particular purpose, U.C.C. § 2-315 (1995), implied duties of good faith and unconscionability, id. §§ 1-203, 2-403, 2-302, Magnuson-Moss Warranty Law, id. § 2-316, new home warranty laws, and state usury laws.


222. “The intellectual torture which our courts inflict on legal doctrine will be obviated when we have brought ourselves to the point where we are willing to accept as sufficient justification for a decision the ‘non-technical’ considerations which really motivated it.” Fuller, supra note 19, at 435, quoted in Boyle, supra note 19, at 381 n.47. “[A]rgument by analogy and the closely related technique of the legal fiction are often used to disguise change as continuity . . . .” Posner, supra note 29, at 92-93.

223. As of 1985, Professor Atiyah’s observation was that no such acknowledgement had been made by the courts. “Unfortunately, the extreme reluctance of courts to acknowledge openly that they are trying to ensure that a contract operates as a fair exchange means that the conceptual apparatus of the law is highly complex and often obscures what is actually going on.” Atiyah, supra
A number of arguments have been posed against the use of a fairness inquiry as a factor in the interpretation and enforceability of a contract. First, the inference by the Restatement (Second) is that fairness standards are difficult to determine or quantify. Most fairness inquiries are only likely to be successful in resolving whether there was procedural fairness in the negotiation and formation of a contract. Second, substantive fairness's appeal to our sense of justice, in weighing the terms of a contract, is ephemeral. In the end, the justice achievable in a given case must be sacrificed at the altar of generality. "[T]he extreme indeterminacy ... inherent in a principle of substantive fairness prevent[s] it from providing the overarching account of contractual obligation that contract theory requires." The inability to quantify an objective principle for fairness will return this construct to the sarcophagi of the "just price" theorists of the Middle Ages. Third, an efficiency argument can be formulated against the use of a fairness inquiry in general contract cases. Judicial intervention that "thwart[s] individual preferences" is inefficient and antithetical to the free will basis of our jurisprudence.

The preceding criticism of fairness inquiry will not interrupt the task at hand. The criticism takes root in the "ought" of contract theory. For purposes of this analysis, the question is much more parochial. Do courts covertly undertake substantive fairness inquiries? Professor Horwitz described the historical battle between the "substantive fairness theory" of contract and the "will theory" of contract:

Note 23, at 9.
224. See, e.g., Restatement (Second) of Contracts § 79 cmt. c (1979) (noting that parties, themselves, are in a better position to determine valuation).
228. One commentator noted:
Only in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange. In its place, they asserted for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties. Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917, 917 (1974) (emphasis added).
229. Professor Barnett states that "[w]e look to contract theory . . . to tell us which interpersonal commitments the law ought to enforce." Barnett, supra note 25, at 269 (emphasis added).
The rise of a modern law of contract . . . was an outgrowth of an essentially procommercial attack on the theory of objective value which lay at the foundation of the eighteenth century’s equitable idea of contract.

. . . The role of contract law was not to assure the equity of agreements but simply to enforce only those willed transactions that parties to a contract believed to be to their mutual advantage.230

The debate was framed so as to posit the importance of practicality in a market economy against the metaphysics of justice and equality. In the end, the former prevailed. The rationale for the demise of substantive fairness was provided in Gulian Verplanck’s 1825 work, An Essay on the Doctrine of Contracts.231 Additionally, Professor Horwitz explains, “[I]f value is solely determined by the clash of subjective desire, there can be no objective measure of the fairness of a bargain. Since only ‘facts’ are objective, fairness can never be measured in terms of substantive equality.”232 He concludes that two things came out of this “revolution” in contract theory.233 First, there was a creation of “a great intellectual divide between a system of formal rules . . . the ‘rule of law’ and those ancient precepts of morality and equity, which . . . were . . . render[ed] suspect as subversive of ‘the rule of law.’”234 Second, and more important to the present inquiry, the “nineteenth century courts and doctrinal writers did not succeed in entirely destroying the ancient connection between contracts and natural justice.”235 Thus, the norms of substantive fairness have always been a part of our contract jurisprudence.

In the area of form or standardized contracts, the fiction of intent has been fully exposed. The notion of fairness as a standard for enforceability and interpretation has been widely accepted. This acceptance may be the door that swings open to the use of the fairness norm in more and more types of contract cases. The fiction of intent to imply fair contract terms has found a place in a great deal of contract

230. Horwitz, supra note 228, at 947.
232. Horwitz, supra note 228, at 949.
233. See generally Horwitz, supra note 45, at 160-211 (relating the historical change towards the equitable conception of contract).
234. Horwitz, supra note 228, at 956.
235. Id. at 955 (emphasis added).
The aura of certainty, convenience, and ease in administration of formal rules will continue to have many suitors. The Ninth Circuit, in *McDonald's Corp. v. Barnes* supra restated the case against the fairness inquiry. ""Courts have no right to remake contracts to comport with some unspecified notion of fairness nor to refuse enforcement on that ground."" The rationale of indeterminacy is in full force in this case. In *Bolen v. E.I. DuPont De Nemours*, the court found it ""troubling"" that some ""instances . . . [of] application of contract law [are] a transparent invitation to the fact finder to decide not what the 'contract' was, but what 'fairness' requires."" The Fourth Circuit emphatically noted that ""Virginia law plainly says that fairness is for the parties to the contract to evaluate, not the courts. Our task is rather one of enforcement."" The Seventh Circuit concurred, holding that ""the terms of the contract control, and it is not our function to rewrite them according to our own notions of fairness."" Nonetheless, research yields a bountiful harvest of cases where the courts have rewritten contracts without apology. They generally rewrite covenants not-to-compete, restrictions on the alienation of real property,

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236. It has been noted:

The implication of additional terms is usually justified on the grounds that it is necessary in order to give business effect to the intentions of the parties; the parties obviously intended such an obligation, and the agreement makes commercial nonsense without it. . . . In some instances, the courts seem to have gone beyond this, and implied terms largely because this was necessary to achieve substantial justice between the parties.

S.B. Marsh & J. Soulsby, Outlines of English Law 177-78 (3d ed. 1982) (emphasis added). Examples of areas of the law where judicial implication has been pronounced include: carriage of goods (seaworthiness), sale of goods (merchantability), employment law (safe workplace), and landlord-tenant law (fitness for habitability).

237. No. 92-36552, 1993 U.S. App. LEXIS 23513 (9th Cir. Sept. 14, 1993) (limited use opinion) (decision reported without published opinion as table case at 5 F.3d 537 (9th Cir. 1993)).

238. Id. at *13 (quoting Villegas v. Transamerica Fin. Servs., Inc., 708 P.2d 781, 784 (Ariz. Ct. App. 1985)).

239. The following is the best definition of the determinacy-indeterminacy dialectic: ""Indeterminate authority may be illustrated by reference to ideas of 'honor,' or 'morality,' or 'fashion.' . . . [Y]et none can be fully defined. . . . [Determinate] authority finds its source in some human organization."" Bernard F. Cataldo et al., Introduction to Law and the Legal Process 7 (3d ed. 1980).


241. Id. at *8-9.


form contracts, satisfaction clauses, and exculpatory clauses. More recently, some courts have used the notion of "good faith" to disguise its rewriting of contracts as something other than a full-fledged fairness inquiry. "Good faith... emphasizes... consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Some commentators have described this inherent duality in most cases as the phenomena of "sympathy" or "empathy" at play. There is a "tension between the judge's engagement with the case... before him and his responsibility to the judiciary as a whole as a struggle between 'empathy' or emotional bonding... and 'legality' or rational rules." The empathy or sympathy role may incline a judge to void a contract because of substantive unfairness, while the concern for the stability of contract rules may cause a judge to frame the decision in trickery and to the distinguishment of precedent. The flexibility of stare decisis enables a skilled judge to serve both the fairness and "promise-enforcing external god[s]" of contract:

[A]djudication routinizes both analogy and modification, each of which enables sympathy's search for common ground. ...

... [Sympathy's moderation can be achieved through] the vast ability of judges to distinguish cases or uncover similarities between them by shifting their perspectives on the meaning of fact patterns. ...

[A]nalogy is, after all, imperfect. ...

... Doctrinal flexibility (or indeterminacy) rests on an ability to narrow a previous holding and distinguish a new fact pattern without

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244. See generally Anita Cava & Don Wiesner, Rationalizing a Decade of Judicial Responses to Exculpatory Clauses, 28 SANTA CLARA L. REV. 611 (1988).

245. See, e.g., Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 199 (1921); Hubbard Chevrolet Co. v. General Motors Corp., 873 F.2d 873, 876-77 (5th Cir.), cert. denied, 493 U.S. 978 (1989) ("The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms."); cf. Texas Nat'l Bank v. Sandia Mortgage Corp., 872 F.2d 692, 698 (5th Cir. 1989) (limiting implied covenant of good faith and fair dealing to an "implied promise that a party will not do anything to prevent or delay the other party from performing the contract").

246. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979), quoted in Hubbard Chevrolet Co., 873 F.2d at 876.


249. Note, supra note 150, at 1968 (emphasis added).

250. MACNEIL, supra note 22, at 17.
attacking the facial validity of that previous holding.\(^{251}\)

The place of a fairness inquiry in modern contract law is taken up again by Professor Eisenberg in his analysis of the bargain principle.\(^{252}\) He notes that the bargain principle’s “conceptual simplicity,”\(^{253}\) as a device to short-circuit the “complexity” of a fairness inquiry, has been an illusion. “Concepts of fairness were smuggled into contract law . . . .”\(^{254}\) An unlimited bargain principle can be justified within certain parameters. First, the economic marketplace is one of simplicity and of relatively perfect competition. Second, the per se application of the bargain principle will lead to systemic fairness and efficiency at the expense of injustice in a given case. “[F]ailure to enforce bargain promises to their full extent [will] subvert efficiency by diminishing the willingness of private actors to enter into and plan upon the basis of credit transactions.”\(^{255}\) Third, “[t]he contract price is normally the most efficient price, in the economist’s sense of that term.”\(^{256}\) In reality, we live in a highly complex marketplace, inequality of bargaining positions calls into question the existence of “perfect competition,” and there are enough externalities (e.g., government intrusion) to lessen the price efficiency parameter.\(^{257}\) Professor Eisenberg concludes that “[p]lacing limits on the bargain principle involves costs of administration. Failure to place such limits, however, involves still greater costs to the system of justice.”\(^{258}\)

**F. Fairness Micro-Management and Systemic Fairness**

A fairness inquiry involves the application of fairness concerns to a particular case. It involves the query of whether a formal contract rule should be avoided in order to obtain a just or fair result between the parties involved. In contrast, systemic fairness can be utilized to support a variety of rationales for contract enforceability. These two senses of


\(^{252}\) Eisenberg, *supra* note 27.

\(^{253}\) *Id.* at 800.

\(^{254}\) *Id.* at 801.

\(^{255}\) *Id.* at 746.

\(^{256}\) *Id.*

\(^{257}\) “[E]conomic relationships are more complex than the two traders in the [perfect] competition model.” Beermann, *supra* note 149, at 560.

\(^{258}\) Eisenberg, *supra* note 27, at 801.
fairness may be quite divergent.\textsuperscript{259} The application of formal rules, without concern for the fairness factors of a specific case, has been justified based upon the notion of systemic fairness. The predictive nature of contract law will be served by enforcing the “free will” rules of contract. The participants in the free market will have “fair warning” of the rules of the exchange. In order to ensure a fair and predictable playing field for future business transactions, the impracticality of case-by-case fairness micro-management must give way to full enforcement.

A number of formulations can be useful to help understand the macro-micro duality of fairness rationales. First, the duality can be articulated by the Rawlsian notion that “all obligations arise from the principle of fairness.”\textsuperscript{260} By voluntarily entering into the arena of contractual obligations, one is consenting to the rules of law that provide the framework for exchange. To borrow a term, there are two sets of possible obligations: (1) the personal obligation to the other contracting party; and (2) “institutional obligations.”\textsuperscript{261} The “institutional obligation” in this case would be the institution of contract law or of the free market system. The benefits and efficiency produced by the system or institution is premised upon the participant’s adherence to its rules even in the face of personal unfairness in a specific case. “The institutional obligation...is one that a person \textit{voluntarily incurs} as a result of...participation in a particular social scheme.”\textsuperscript{262}

An alternative formulation is one based strictly upon utilitarian grounds. Contract doctrine and rules, founded upon legitimate values and public policy, will generally regulate the marketplace in an efficient and fair manner. However, like all human endeavors, contract rules will not be perfect in formulation or enforcement. Unfairness in a given case is the expense for the overall benefits being forwarded by the general application of law. These benefits include predictability, certainty of law,

\textsuperscript{259} Judge Posner refers to these two concepts of fairness as the “tradeoff between formal and substantive justice.” \textsc{Posner, supra} note 29, at 38. This dialectic is often framed as the difference between “form and substance—form referring to what is internal to law, substance to the world outside of law, as in the contrast between formal and substantive justice.” \textit{Id.} at 40.

\textsuperscript{260} \textsc{John Rawls, A Theory of Justice} 342 (1971), \textit{cited in} Harris, \textsc{supra} note 176, at 946 & n.122.

\textsuperscript{261} Alan Gewirth, \textit{Obligation: Political, Legal, Moral}, in \textsc{NOMOS XII: Political and Legal Obligation} 55, 57 (J. Roland Pennock & John W. Chapman eds., 1970), \textit{cited in} Harris, \textsc{supra} note 176, at 927 n.36; \textit{see also} H.L.A. Hart, \textit{Are There Any Natural Rights?}, in \textsc{Human Rights} 61, 70 (A.I. Melden ed., 1970).

\textsuperscript{262} Harris, \textsc{supra} note 176, at 944 (emphasis added) (footnote omitted).
and rules of fair play. The costs of performing a substantive fairness inquiry at the expense of general rule application is contractual unpredictability, chaotic rule enforcement, judicial micro-management of private affairs, and the resultant systemic inefficiency. In the end, the “greater good” of free market transactions are fostered by freedom of contract.

Professor Summers’ work on common-law justification provides another formulation for general rules application at the expense of ad hoc fairness inquiries.263 He lucidly analyzes the “substantive reasons” given in support of judicial decision-making: “When judges appeal to moral, economic, political, institutional, or other social considerations—[they] give ‘substantive reasons’...”264 Substantive reasons can be divided into “goal reasons” and “rightness reasons.”265 Systemic fairness is within the realm of “goals” justification. The goal-rightness dichotomy is somewhat amenable to a formulation for explaining the systemic-substantive fairness duality. Goal reasons are premised upon the future orientation of judicial decision-making. “[T]he decision [a goal reason] supports can be predicted to have effects that serve a good social goal.”266 In contrast, “rightness reasons” may be used to support a decision of substantive fairness based upon the history of the case at issue. “[A] rightness reason draws its force from the way in which the decision accords with a sociomoral norm of rightness as applied to a party’s actions or to a state of affairs resulting from those actions.”267 Thus, a goal reason for a rule application is to affect future behavior. The well-being of the present parties may need to be sacrificed because of “the predicted decisional effects.”268 For example, the negative effects on contractual certainty may warrant a more formalistic enforcement of a contract rule. In contrast, a rightness reason “does not purport to predict the future effects... Rather, the essential relation of accordance between decision and norm either exists or does not exist at the time of decision.”269 The sociomoral norm of “conscionability” would permit the correction of a one-sided bargain which resulted from a party taking

264. Id. at 710.
265. Id. at 714.
266. Id. at 717. Summers enumerates a number of goal reasons: general safety, community welfare, and public health. Id.
267. Id. at 718. Rightness reasons include: conscionability, justified reliance, restitution for unjust enrichment, and fittingness or proportionality of remedy. Id. at 718-19.
268. Id. at 775 (emphasis added).
269. Id. (emphasis added).
advantage of a weaker, unsophisticated counterpart.\textsuperscript{270}

Fairness analysis does and should have a place in common law
decision-making. It comes into play both at the macro or systemic level
and at the micro or case level: "The obligation of fairness simultaneously
prohibits one from taking advantage of another [micro level], while
prescribing that one must comply with . . . the rules governing the
enterprise [macro level]."\textsuperscript{271} Evidence of the rise of fairness at the
micro level can be found in the case law. Many of the rules and
formalities of classical contract law have been narrowed by the
development of numerous exceptions. These exceptions were created to
temper the harshness associated with rigid rule application. The fairness
or reasonableness norm has been on the rise as noted by the "new spirit"
of contract theorists.\textsuperscript{272} This new spirit will be analyzed by reviewing
the law of satisfaction. The question to be asked is how have courts dealt
with the notion of satisfaction when it affronts notions of fairness? Along
with attempting to answer this question, a couple of side issues will be
addressed. First, whether the courts make use of "fictions," such as
contractual intent, in the quest for fairness in a regime characterized by
formalism, generality, and freedom of contract. Second, whether courts
have become more open to the task of a "fairness in the exchange"
inquiry.

\textbf{III. THE LAW OF SATISFACTION: A SEARCH FOR "JURAL
RUDIMENTS" AND HUMAN VALUES}

Case law is the lifeblood of the common law. Any analysis must
ultimately judge itself against the litmus test of application of the rules
and doctrine, the work product of precedent, to real cases. It is at the
grassroots, the interfacing of law and fact, where the law is applied or,
for those of Cardozian ilk, where law is "created."\textsuperscript{273} "[W]ithin the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{270} See \textit{id.} at 718-19.
\item \textsuperscript{271} Harris, \textit{supra} note 176, at 946. Even though the author of this quote used it in a different
context, its language has been adopted to illustrate my point. "[L]egal obligations of fairness provide
the citizen with moral reasons to obey the law \textit{qua} law upon which she ought to act." \textit{id.} at 964.
\item \textsuperscript{272} See \textit{supra} notes 101, 105-11 and accompanying text; see also infra part IV.B.
\item \textsuperscript{273} \textit{CARDOZO, supra} note 2, at 142-45. Cardozo notes that, in most legal systems, the judge
acts both as an applier of existing rules, \textit{id.} at 114 (characterizing the judge's responsibility as "the
duty of adherence to the pervading spirit of the law"), and as a creator or legislator of new law. The
issue is the use of judges "as legislators" in a given legal system. Ihering states:

\begin{quote}
How far if at all the needful changes can or ought to be carried out by judicial decisions
or the development of legal theory, and how far the intervention of the legislator will be
called for, is a matter that will vary from one legal territory to another according to the
\end{quote}
\end{itemize}
\end{footnotesize}
limits [precedent and custom] thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end." Cardozo points out that it is the task of a judge to look to existing rules of law and doctrine for guidance, but that the hoped for guidance is often not clearly forthcoming. "We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will . . . determined the form and tendency of a rule which at that moment took its origin in one creative act." In the words of Justice Cardozo: "[The judge] is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." In Kantian terms, justice in an individual case must be sacrificed for the integrity of our system of justice. "Man feels in himself a powerful counterpoise against all commands of duty which reason presents to him as so deserving of respect; this counterpoise is his needs and inclinations . . .." In a given case, the inclination to ensure fairness or to prevent an injustice may lead a court to create an exception to the application of a general rule of law. Kant argues that the court should resist such temptation but recognizes such claims to be "impetuous and yet so plausible." From this illusion of doing justice in a given case, Kant, in his *Foundations of the Metaphysics of Morals*, argues:

accepted traditions as the binding force of precedents, the character of the enacted law, and the wider or narrower of judicial interpretation.

*Hering*, supra note 136, at 115 n.23. For example, the role of judge as legislator would be extremely limited in a civil law system where the code is the "only" law, reference to judicial precedent is at best implicit, and the range of judicial interpretation is narrowly defined. See generally John H. Merryman, *The Civil Law Tradition* (2d ed. 1985). Merryman states, "[T]he familiar common law doctrine of *stare decisis* . . . is obviously inconsistent with the separation of powers as formulated in civil law countries, and is therefore rejected by the civil law tradition. Judicial decisions are not law." *Id.* at 22 (emphasis added).

274. *Cardozo*, supra note 2, at 103 (emphasis added).
275. *Id.* at 103-04 (emphasis added).
276. *See discussion infra* part IV.A.1-2.
277. *See supra* part II.F (examining the duality of systemic fairness versus ad hoc fairness or justice).
278. *Cardozo*, supra note 2, at 141.
280. *Id.*
[A] natural dialectic arises, i.e., a propensity to argue against the stern laws of duty and their validity, or at least to place their purity and strictness in doubt and, where possible, to make them more accordant with our wishes and inclinations. This is equivalent to corrupting them in their very foundations and destroying their dignity—a thing which even common practical reason cannot ultimately call good.281

More specifically, teleological unfairness in a case can be justified by an expanded utilitarian analysis. Kant's notion of the universalization of all moral acts holds that the inclination to examine the effects of a decision must be ignored. A rational being is one which acts and decides based upon a "conception of law."283 Conformity to a rule of law is an ultimate good in itself. The perceived negative effects of applying a rule in a given situation are irrelevant to one's notion of rightness. For Kant, effects resulting from an action are only theoretical while application of a rationally reasoned law is an unconditional "categorical imperative."284 The rationalism for legal formalism can find much grounding in this moral philosophy. To countenance ad hoc inquiry into the theoretical effects of a decision is to doom the legal enterprise "into sheer inconceivabilities and self-contradictions, or at least into a chaos of uncertainty, obscurity, and instability."285 The impact of Kantian thinking on American jurisprudence has been noted:

281. Id.
282. Kant's notion of the universalization of all moral rules is stated in his categorical imperative: "Act according to maxims which can at the same time have themselves as universal laws of nature as their object." Id. at 55-56.
283. For Kant, respect for law in and of itself can be an ultimate good. "The only object of respect is the law, and indeed only the law which we impose on ourselves and yet recognize as necessary in itself." Id. at 18 n.2.
284. Kant posits the question: "How is a categorical imperative possible?" Id. at 72. In responding, he explains the dichotomy between the "rational world" and the world of emotion, or "the world of sense." Id. It is this difference that argues for the generality of law and one's duty to obey the law in spite of personal hardship. Hardship is a consequence which has no place in Kantian ethics:

I recognize myself qua intelligence as subject to the law of the world of understanding and to the autonomy of the will. . . . I recognize myself as subject to the law of reason which contains in the idea of freedom the law of the intelligible world, while at the same time I must acknowledge that I am a being which belongs to the world of sense. Therefore I must regard the laws of the intelligible world as imperatives for me, and actions in accord with this principle as duties. Thus categorical imperatives are possible because the idea of freedom makes me a member of an intelligible world.

Id. at 72-73 (emphasis added).
285. Id. at 20.
[American jurisprudence] has held fast to Kant's categorical imperative . . . . It has refused to sacrifice the larger and more inclusive good to the narrower and smaller. A contract is made. Performance is burdensome and perhaps oppressive. If we were to consider only the individual instance, we might be ready to release the promisor. We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society that contracts shall be fulfilled.286

A naive or amateur capitalist must not be rescued from the harm of a bad bargain. Changed circumstances should not cause a rescission or modification of a contract.287 Satisfaction as a condition for a reciprocal performance may be negotiated as an express term of an agreement. A court should not give legal force to correspondence lacking the necessary formalities and “operative phrases”288 of contract despite evidence of reliance. Under what rationales have these assertions been justified? Consent theory and freedom of contract hold that the courts should not interfere with the ability to negotiate and agree to contractual terms.289 Capitalism’s “survival of the fittest” attitude awards those based upon their relative acumen and judgment. If market conditions change so as to render a contract unprofitable, so be it. The predictive skills of the other party should be aptly rewarded. If an event transpires to the detriment of one of the parties, so be it. The risk allocation agreed to by the parties should be preserved. If the satisfaction of the promisee is not achieved, so be it. The promisor should be made to accept the consequences of entering into such a contract. Reliance upon such noncontractual instruments as “comfort letters”290 should be subject only to nonlegal sanction.291 Parties should not be allowed to cloak disagreement by

286. CARDozo, supra note 2, at 139-40.
287. The expansion of the “doctrines of frustration, impracticability, and impossibility” seem to indicate otherwise. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 261-271 (1979) (discussing the various sections on frustration, impracticability, and impossibility); John P. Dawson, Judicial Revision of Frustrated Contracts: The United States, 64 B.U. L. REV. 1 (1984) (comparing the trend in the United States of increased judicial intervention in contract situations where there has been an unforeseen change with the position taken in German courts).
288. See DiMatteo & Sacasas, supra note 33, at 381-86 (discussing the notion of “operative phrases” of contract).
289. See infra notes 489-504 and accompanying text.
290. See infra notes part III.H.
291. Charny categorizes some of the nonlegal sanctions as: the “loss of reputation among market participants,” resulting in the loss of valuable business opportunities, the “loss of opportunities for important or pleasurable associations with others,” the “loss of self-esteem,” and “feelings of guilty.” Charny, supra note 102, at 392-93.
“formalizing” representations in ambiguous, noncommittal instruments.

Kant poses a question, the answer to which is at the core of any theoretical or metaphysical foundation of the law of contract: “May I, when in distress, make a promise with the intention not to keep it?” Kant notes a number of traps that weigh against allowing one out of his or her duty to keep a promise. First, “consequences cannot be so easily foreseen.” The apparent benefit of the release may have unforeseen consequences. For example, the release from one’s promise may inhibit one’s ability to enter into future exchanges of promises. Ironically, Kant uses this teleological argument as an initial basis for the absolute duty to keep one’s promises. A more fundamental Kantian argument is that releasing one from a promise cannot be universalized. “I could will the lie [in a particular situation, i.e., an exception] but not a universal law to lie.... My maxim would necessarily destroy itself....” Thus, legal formalism has a readily made moral foundation provided by Kantian ethics’ unconditional obligation to duty.

A major development has been the expansion of law into uncharted waters where formalistic rule application has given way to the ad hoc inquiry long found in the realm of equity. This so-called “new spirit” of contract can be seen in a number of developments including: (1) the conversion of satisfaction contracts from subjective to objective standards; (2) the implication of terms into contracts under the rue that if the parties had been alerted to certain possibilities they would have expressly negotiated the terms being implied; and (3) the continued advance of reliance as a potential ground for the enforcement of quasi-legal instruments. These areas are the new battlefield where the fight has been waged between those advocating case by case fairness inquiry and those holding firm that the generality of law requires that no such inquiry be performed. Upon reflection of the circular nature of this fight, one commentator eloquently stated:

[One] view might say we should examine contracts ad hoc and enforce only those judged to involve a fair exchange. The rules position might

292. KANT, supra note 58, at 18.
293. Id. at 19.
294. Id.
295. See infra notes 508, 512-13 and accompanying text.
criticize the standards position as involving too much arbitrary discretion on the question of fairness. To avoid the quagmire of the fairness inquiry, we should simply follow the rule: enforce all contracts freely entered. Enforcement of the rule, however, requires asking which contracts have been freely entered. . . . Implemention of the rule, therefore, involves a circular return to a standard-like fairness inquiry . . . .

A review of these areas of law will hopefully shed light upon this debate. How formalistically have courts applied the rules of contract presently stated? How have these rules been transformed to meet changing conditions or to reflect changing juristic inclinations? What legal principles, values, and notions of fairness can be distilled from the cases? Can legal generality and ad hoc fairness inquiries both find a place within judicial decision making?

A. Express Satisfaction Clauses: What You Said Is Not What You Meant?

Satisfaction is a contract norm which applies to all contractual arrangements, either expressly or implicitly. Contracts, in their express consensual form, involve the exchange of performances or consideration. This may involve the performance of services, the manufacture or delivery of goods, or the payment of money. It is assumed both by the parties and the courts that the reciprocal considerations are to be performed in a satisfactory manner. The question is to whom's satisfaction should the performance be judged? Can the promisee reject a good faith and reasonable performance based upon her own subjective standards? Alternatively, can one negotiate a subjective satisfaction term into a contract and be certain of judicial enforcement in case of a dispute? The answer is probably not.

Satisfaction clauses have traditionally been bifurcated along lines of subject matter. A satisfaction clause in commercial contracts will

296. Hager, supra note 188, at 1061-62.
297. See, e.g., 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 646 (1960); see also Hutton v. Monograms Plus, Inc., 604 N.E.2d 200, 203-04 (Ohio Ct. App. 1992). A similar bifurcation is often made in the law of assignments. The general rule is that, unless expressly provided otherwise, a contract is fully assignable. Exceptions have been formulated for types of performances that are "purely personal." If a contract is one for personal or unique services, then it is not assignable without consent of the obligee. Furthermore, death or disability of the obligor discharges the contract. See, e.g., Mackay v. Clark Rig Bldg. Co., 42 P.2d 341, 348 (Cal. Dist. Ct. App. 1935). See generally Larry A. DiMatteo, Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability, 27 AKRON L. REV. 407 (1994) (explaining that the nature or
generally be judged based upon an objective standard. *Restatement (Second) of Contracts* states that, when satisfaction is a condition, “an interpretation is preferred under which the condition occurs if such a *reasonable person* in the position of the obligor would be satisfied.” 298

The second category of contracts is one involving factors of “fancy, taste, or judgment.” 299 The satisfaction with a written screenplay or a portrait painting are paradigmatic examples of the second category of satisfaction clauses. However, the line of demarcation between the two categories of satisfaction clauses is not always clear. It has been held that subjective satisfaction clauses are acceptable as to the determination of the “reliability and trustworthiness” of the purchaser of realty,300 to the determination of the credit worthiness of a purchaser as the “sole judge” of the seller,301 to the evaluation of real estate leases,302 and to the termination of a physician’s employment contract.303 The court in *Beasley v. St. Mary’s Hospital* held that a subjective satisfaction clause allows for even “unreasonable” terminations of the contract. “Where, as here, a contract incorporates a subjective satisfaction standard, the objective reasonableness of the obligee’s performance is not dispositive.”304 The only ground to challenge the exercise of the satisfaction clause is whether the party exercising its rights under the clause was in fact “not dissatisfied” or did not exercise the clause “on account of its dissatisfaction.”305

Given this judicial bifurcation of satisfaction clauses, can the parties

subject matter of contract must be personal to determine the consent of the parties).

298. *Restatement (Second) of Contracts* § 228 (1979) (emphasis added).


303. *Beasley v. St. Mary’s Hosp.*, 558 N.E.2d 677 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 835 (Ill. 1990). The importance of this case is the idea that personal service contracts are generally categorized as contracts “involving matters of fancy, taste, sensibility and judgment.” *Id.* at 682. Given that a large portion of our gross national product constitutes personal services, the subjective satisfaction category takes on great importance. *See Ray v. Georgetown Life Ins. Co.*, 419 N.E.2d 721 (Ill. App. Ct. 1981) (discussing termination of employment under personal service contracts); *see also Tiffany v. Pacific Sewer Pipe Co.*, 182 P. 428, 430 (Cal. 1919) (noting that factors involved in determining whether performance is satisfactory are too numerous to permit the application of a reasonable person standard and, thus, the standard is the party’s subjective satisfaction); *Brenner v. Redlick Furniture Co.*, 298 P. 62 (Cal. Dist. Ct. App. 1931).


305. *Id.*
agree to broach the line between the "purely subjective" and those "capable of objective evaluation?" Within the realm of freedom of contract, the answer seems clear. In *Forman v. Benson*, the court answered the question in the affirmative: "[T]he parties may agree to a reservation in one party of the absolute and unqualified freedom of choice on a matter not involving fancy, taste, or whim." The case for such unfettered discretion is made stronger when the subjective standard is a negotiated term and was the inducement for the one party to enter into the contract. The *Forman* court noted that, even when such factors exist, the subjective standard does not provide for an unlimited right of rejection. The court stated, "The personal judgment standard...does not allow the defendant to exercise unbridled discretion in rejecting" performance. The subjectiveness of subjective satisfaction clauses continues to be fertile ground for debate.

1. Satisfaction Clauses: Is Subjective Satisfaction Defined Objectively?

Despite the liberal or classical concept of freedom of contract, courts have been reluctant to uphold subjective satisfaction clauses. In the 1992 Second Circuit case of *Misano di Navigazione, SpA v. United States*, the court stated its preference for objective satisfaction: "When a contract conditions performance upon the satisfaction of one party and is ambiguous as to the applicable standard of satisfaction, courts generally require performance to the satisfaction of a reasonable man..." The rationales which may be forwarded include the belief that the parties did not intend the subjective satisfaction provision to mean what it, in plain language, expresses. The promisor is presumed to have believed that performance rendered "subject to the satisfaction" of the promisee would only be enforced by a court after a determination of the reasonableness of the rejection. In fact, numerous courts have filtered subjective


308. *Forman*, 446 N.E.2d at 540.

309. 968 F.2d 273 (2d Cir. 1992).

310. *Id.* at 274.
satisfaction clauses through the infamous reasonable person standard. Generally, if a performance is one for commercial or consumer goods or services, then satisfaction will be determined by customary or community standards of reasonableness. The reasoning seems to be two-fold. A subjective standard is susceptible to capriciousness and arbitrariness. A change in circumstances may render the transaction less profitable to the beneficiary of the satisfaction clause. The clause can then be used as a technical loophole for the avoidance of a bad bargain ex post facto.

Second, the court is “able” to apply an objective standard. In the words of the Misano di Navigazione court, the preference is to apply a reasonable person standard “particularly when a definite objective test of satisfaction is available.” Only when performance involves some form of artistry or uniqueness will subjectiveness be allowed its day in court.

A traditional law school hypothetical illustrates the point. John and Mary Homebuyer hire ABC Construction Company to construct a custom single-family home. The contract provides an express satisfaction provision: Final payment subject to the final approval and personal satisfaction of the Homebuyers. In the event of a dispute, Homebuyer’s decision is final. The work is performed in accordance with both industry standards and the state building code, as is evidenced by the issuance of a certificate of occupancy by the local government building inspector. Nonetheless, the work is rejected by Homebuyers as being unsatisfactory. Will the court enforce the express language of the building contract?

Unlike Misano di Navigazione, this hypothetical contains no ambiguity regarding intent. The subjective satisfaction of the Homebuyers is the standard prescribed by the contract. A number of courts have recognized the power of the parties to agree to a subjective standard. They have, nonetheless, developed a number of devices to

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311. Id.
312. See, e.g., Forman, 446 N.E.2d at 539. A seminal case on the implication of “reasonableness” in a building contract satisfaction clause is Morin Bldg. Prods. Co. v. Baystone Constr., Inc., 717 F.2d 413 (7th Cir. 1983). The Seventh Circuit argued, in detail, for a “presumption of reasonableness.” The court noted, “[T]he presumption that the performing party would not have wanted to put himself at the mercy of the paying party’s whim is overcome when the nature of the performance contracted for is such that there are no objective standards to guide the court.” Id. at 415. The court briefly pays homage to “freedom of contract” and the ability of the parties to agree to such “whim.” The court stated:

Lest this conclusion be thought to strike at the foundations of freedom of contract, we repeat that if it appeared from the language or circumstances of the contract that the parties really intended [that one has] the right to reject [the other party’s] work for failure to satisfy [one’s] private aesthetic taste . . . , the rejection would have been
apply an objective safeguard to the application of subjective satisfaction clauses. In a case involving the application of a satisfaction clause in a contract for the underground installation of television cable, the court upheld the subjectiveness of the satisfaction clause: "Under the law of 'satisfaction' contracts, the party for whom performance is rendered may reject if his dissatisfaction is genuine. There is no objective standard. The relevant inquiry is not whether he ought to have been satisfied, but whether he was satisfied." This seems clear enough. The operative phrase, however, is that "his dissatisfaction is genuine." The performance may be subjectively rejected, but the rejection must "not [be] prompted by caprice or bad faith."

The question becomes what standard is to be used to determine if the dissatisfaction was, in fact, one of good faith? This issue was addressed in Larwin-Southern California, Inc. v. JGB Investment Co. The case involved a typical developer land purchase contract. The contract provided for a number of contingencies that allowed the developer-purchaser to avoid the contract upon the completion of an engineering and feasibility study. The contract provided that these contingencies were to be deemed removed only upon the satisfaction of the purchaser. The contract provided, "Buyer's approvals provided for in this [contract] may be given or withheld in its sole judgment and discretion . . . ." Despite its plain meaning, the court held that the proper even if unreasonable.

Id. at 417.

313. See, e.g., Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 769 (2d Cir. 1946) (Frank, J., concurring) ("[A]nyone can see who reads the large number of cases in this field, [the] numerous intricate methods of getting around the objective theory.").

314. Nohera Communications v. AM Communications, 909 F.2d 1007, 1011 (7th Cir. 1990) (emphasis added).

315. Id.

316. Id.

317. 162 Cal. Rptr. 52 (Ct. App. 1979).

318. Id. at 54 (emphasis added). In noting that clear contractual language is needed before a court is likely to apply a subjective standard, Professor Farnsworth states, "Words such as personal or entire satisfaction and sole judgment help to show that honest [subjective] satisfaction was intended." FARNSWORTH, supra note 42, § 8.4, at 583 n.35; see, e.g., Ard Dr. Pepper Bottling Co. v. Dr. Pepper Co., 202 F.2d 372, 376, 377 (5th Cir. 1953) (citing a lack of evidence of "actual ill will"); Gibson v. Cranage, 39 Mich. 49, 50-51 (1878); Fursmidt v. Hotel Abbey Holding Corp., 200 N.Y.S.2d 256, 259-60 (App. Div. 1960). However, courts will generally apply a reasonable satisfaction standard if the express language leaves any room for doubt. See, e.g., Bruner v. Hegyi, 183 P. 369, 370 (Cal. Dist. Ct. App. 1919) (noting that, where the contract calls for the "fruits of the labor of the contractor," the court will not allow into evidence a prior oral agreement to clarify language of contract); Hawkins v. Graham, 21 N.E. 312, 313 (Mass. 1889) ("In doubtful cases courts have been inclined to construe agreements . . . to do the thing in such a way as reasonably ought
subjective satisfaction standard provided for in the contract is to be tempered by "an implied duty of good faith."319

Is this "good faith" to be subjectively or objectively determined? One may argue that a subjective standard would be more consistent with the subjective nature of the satisfaction clause. The question to be asked is did the party in question reject performance out of sincerity and honesty? Whether a reasonable person would have accepted performance is irrelevant. This seems to be the position taken by the court in Mattei v. Hopper.320 The case involved a purchase of real estate that was subject to the purchaser obtaining satisfactory leases. Justice Spence determined that the "multiplicity of factors which must be considered in evaluating a lease show" that the standard to be applied is one of subjective satisfaction akin to clauses "involving fancy, taste, or judgment." 321 The line between "honest judgment" or "good faith" and "bad faith" is whether the dissatisfied party had become "dissatisfied with the performance" as opposed to becoming dissatisfied with the contract.322 A party should not, however, be able to avoid a bad bargain under the ruse of dissatisfaction with a satisfactory performance. Under this approach, the subjective state of mind of the party exercising his "right of dissatisfaction" would be the operative factor.

A more prevalent approach seems to accept the subjective right of dissatisfaction, but to apply an objective standard of good faith in determining if the right has been exercised arbitrarily. "[T]he expression of dissatisfaction must be genuine and not arbitrary, and that an objective criterion,—good faith—controls the exercise of the right to determine satisfaction."323 The use of an objective standard to determine good

319. Larwin-Southern Cal., Inc., 162 Cal. Rptr. at 59. The notion of "good faith" dissatisfaction has long been used to defeat claims of illusory consideration. If one party's obligation to perform is totally discretionary upon its satisfaction with the other party's performance, then the contract is void because of a lack of mutuality of obligation. The implication of good faith into such satisfaction clauses saves the contract from being a "per se nullity." Id. at 58; see also Pittston Warehouse Corp. v. American Motorists Ins. Co., 715 F. Supp. 1221, 1227-28 (S.D.N.Y. 1989); Aster v. BP Oil Corp., 412 F. Supp. 179, 189, 191 (M.D. Pa. 1976), aff'd, 549 F.2d 794 (3d Cir. 1977); Mattei v. Hopper, 330 P.2d 625, 627-29 (Cal. 1958) (en banc). See generally 1A CORBIN, supra note 297, § 152 (discussing several instances where there is no "mutuality of obligation" yet there is a valid contract).

320. 330 P.2d 625 (Cal. 1958) (en banc).

321. Id. at 627.

322. Id. at 628.

323. Larwin-Southern Cal., Inc., 162 Cal. Rptr. at 59 (emphasis added).
faith is a reflection of the general judicial preference for such standards and the evidentiary difficulty in assessing the state of mind of the party in question. The cloaking of a subjective satisfaction clause with objective good faith seems to be a circular device for masking the courts’ disdain for subjective standards. Ultimately, the difference between the application of an objective standard for satisfaction or a subjective one coupled with objective good faith is at most a difference in degree, and not a difference in kind.


In reviewing cases, one comes across a number of decisions that reveal more clearly than usual evidence of the norms, principles, rules, standards, and “externalities” at work in judicial decision-making. One such case is the 1946 Second Circuit case of Ricketts v. Pennsylvania R. Co. This is an especially attractive case because the majority opinion was written by Learned Hand, with a lengthy concurrence by Jerome Frank. The case questions the validity of a release signed by an injured railroad worker who had been represented by an attorney. On the advice of his attorney, the worker signed a

324. Judge Frank states the rationale for the so-called “objectivists”: “[A]dvocacy of the ‘objective’ standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses.” Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 761 & n.2 (2d Cir. 1946) (concurring opinion) (expanding upon the view of the “objectivists”).

325. This rationale is somewhat disingenuous given the fact that much of contract law is premised upon the determination of the state of mind of the parties to a contract as reflected in contractual intent at the formation of a contract.

326. “[A] wag once inquired whether the difference between a difference of kind and a difference of degree is itself a difference of kind or a difference of degree. The answer . . . is that it is a difference of degree. A difference of kind is merely a violent difference of degree.” Glanville Williams, Language and the Law—II, 61 L.Q. Rev. 179, 192 (1945).

327. For further examination of the “norms” of contract law, see infra part IV.

328. “Principles” shall be defined as the fundamental objectives that inform the rules of contract law.

329. For a discussion of the distinction between rules and standards, see supra notes 114-20 and accompanying text.

330. “Externalities” are facts in a given case that are noncontractual in nature, but nonetheless bear upon the contractual issues of the case. “Fairness” factors may at times be viewed as externalities. Also, a given theory of contract law may construe different factors as externalities. For example, for efficiency theorist, factors of fairness and justice are viewed as external to the fundamental notion of efficiency.

331. 153 F.2d 757 (2d Cir. 1946).

332. The right that was released was one statutorily granted under the Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (1994). The validity of the release, however, was determined to
release without reading its terms. He believed that the release was only for his wages, and not a release for his personal injuries. In fact, the instrument that he signed was a general release for all potential claims. The court held that the fraudulent misrepresentation of the attorney was beyond the scope of his authority. Therefore, the release was held to be invalid.

Judge Hand takes a purely doctrinal approach to the case. He acknowledges the general rule that one is liable for what one has signed: "The theory upon which a document binds one who signs it, but who does not read it, is that either he accepts it whatever may be its contents, or that he has been careless in choosing his informant." The bargain theory's patron saint, Samuel Williston, is cited as authority. Nonetheless, Judge Hand finds an exception within the law of agency regarding the authority of an attorney, explaining that "an attorney has no implied authority to compromise a claim.

The precedential norm of the common-law plays an important part in the rationale of the decision. The case is one-hundred seventy years removed from the Declaration of Independence, but Hand still refers to the "law in England." Judge Frank takes a more circumspect approach in his concurrence. He draws from a multiplicity of norms in reaching his decision by examining the historical debate between the "actual intent" or "will" theorists and the "objective" theorists. He criticizes both approaches for different reasons. The use of the "fiction" of contractual intent by the subjectivist is exposed: "[T]he 'actual intent' theory induced much fictional discourse which imputed to the parties intentions they plainly did not have." As for the objectivists, Judge Frank concludes that they "also went too far." They went too far because "[t]hey tried . . . to treat virtually all the varieties of contractual arrangements in the same way." The objectivists believed that the

be within the purview of the common law. Ricketts, 153 F.2d at 759.
333. Ricketts, 153 F.2d at 760; see also Moity v. New Iberia Bank, 612 So. 2d 140, 143 (La. Ct. App. 1992) ("The signatures of the parties . . . are not mere ornaments . . . ").
334. Ricketts, 153 F.2d at 760.
335. Id. It would seem the facts of this case would dictate a different decision under Professor Fried's "promise principle." A signed release, while being represented by an attorney, warrants the moral obligation to be bound by such a clear use of the convention of promise. MACNEIL, supra note 22, at 16-17. The worker's recourse would be in tort (misrepresentation or malpractice) against his attorney.
336. Ricketts, 153 F.2d at 759.
337. Id. at 761.
338. Id.
339. Id.
use of the “reasonable man” was superior to that of the subjective “meeting of the minds.” Subjectivity, according to the objectivists, “would destroy that legal certainty and stability which a modern commercial society demands.”

However, both theories possessed their own “fictional characters”: subjectivists based all their decisions on the fiction of contractual intent whereas the objectivists modeled the reasonable man after the “economic man” of the free enterprise system. As Judge Frank notes, “The ‘economic man’ is of course an abstraction, a ‘fiction.’” Judge Frank makes use of a variety of theories, principles, and norms previously discussed. The following is a chart of the Frank opinion and its use of contract theory, with references to relevant sources, norms, and schools of thought.

<table>
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<tr>
<th>PHRASE</th>
<th>THEORY/PRINCIPLE/NORM</th>
<th>SOURCE</th>
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<tbody>
<tr>
<td>“economic man”</td>
<td>law and economics</td>
<td>Posner</td>
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<tr>
<td>“the ‘objective’ standard as a necessary adjunct of a ‘free enterprise’ economic system”</td>
<td>law and economics</td>
<td>“Paley, ... a theological utilitarian, a contemporary of Adam Smith”</td>
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<tr>
<td>“a desire for legal symmetry, legal uniformity”</td>
<td>certainty/predictability norm</td>
<td>F.S. Cohen</td>
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340. There are recent examples of the conflict between objective and subjective intent. See, e.g., Artex, Inc. v. Omaha Edible Oils, Inc., 436 N.W.2d 146, 150 (Neb. 1989) (“Parties are bound by the terms of the contract even though their intent may have been different from that expressed in the agreement.”).
341. Ricketts, 153 F.2d at 761 n.2.
342. Id. (emphasis added) (citing Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 133-34 (2d Cir. 1945)).
343. The references in italics are not those of Judge Frank. Some are extrapolated from potential sources from which Judge Frank could have drawn support. Other references to sources subsequent to the Frank opinion is the author’s attempt to “pigeonhole” the phrases into the different categories of theory examined in part I.
344. Ricketts, 153 F.2d at 761 n.2.
345. See POSNER, supra note 29, at 382.
346. Ricketts, 153 F.2d at 761 n.2.
347. Id. (quoting Edwin W. Patterson, Equitable Relief for Unilateral Mistake, 28 COLUM. L. REV. 859, 878 n.56 (1928)).
348. Ricketts, 153 F.2d at 761 & n.5; see Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 845 (1935) (discussing jurisprudence as a study of...
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<th>Phrase</th>
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<td>“non-negligent unilateral mistakes”</td>
<td>“meeting of the minds”</td>
<td>Hand/Williston</td>
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<td>“leads to needless complexities that will confront us in future cases”</td>
<td>teleological theory</td>
<td>contract interpretation by implication</td>
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<tr>
<td>“a good opportunity offers itself to uncomplicate an excessively complicated set of legal rules”</td>
<td>legal formalism</td>
<td>Williston/Restatement</td>
</tr>
<tr>
<td>“I believe that [there] is an important social policy involved”</td>
<td>social contract</td>
<td>social contract theorists</td>
</tr>
<tr>
<td>“their passion for excessive simplicity and uniformity”</td>
<td>legal formalism</td>
<td>objectivists</td>
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human behavior).

349. *Ricketts*, 153 F.2d at 760. Judge Frank is referring to the opinion of Learned Hand, which adopts a category taken from Williston. Judge Frank questions the soundness of this approach.

350. *Id.* at 760.

351. There are matters of social importance, or public policy, that should be implied in contract. This was noted in the 1834 case of *Britton v. Turner*, 6 N.H. 481. The case involved a contract for labor. It provided that payment would be made upon the completion of one year of labor. After completing nine months of work, the laborer left his employment and sued for nine months of compensation. The court acknowledged that the controlling rule of law was that “the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed.” *Id.* at 486. Nonetheless, the court ordered “pro rata compensation” through implication of community standards:

[W]e have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do [sic] not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding . . . .

*Id.* at 493.

352. *Id.* at 481.

353. See supra notes 174, 176, 188.


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<th>PHRASE</th>
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<tr>
<td>&quot;[It is the uncertainty about the 'facts' that creates most of the unpredictability of decisions]&quot;</td>
<td>certainty norm</td>
<td>Corbin(^{356})</td>
</tr>
<tr>
<td>&quot;fundamental principle of the security of business transactions&quot;</td>
<td>legal formalism</td>
<td>Williston</td>
</tr>
<tr>
<td>&quot;values which the conscientious judge faces&quot;</td>
<td>justice/fairness norms</td>
<td>Anti-Williston(^{359})</td>
</tr>
<tr>
<td>&quot;Williston [sought] to avoid the appearance of exceptions,&quot; as opposed to recognizing that &quot;the complete meaning of any concept... is of hopeless complexity&quot;</td>
<td>realism/pragmatic instrumentalism</td>
<td>Fuller/Summers(^{362})</td>
</tr>
<tr>
<td>&quot;most judges are too common-sensible to allow... the appearance of an abstract consistency, to bring about obviously unjust results.&quot;</td>
<td>fairness norm</td>
<td>fair exchange theorists.(^{364})</td>
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356. "The truth is that legal relations are nothing other than groups of facts that enable us to predict with some degree of accuracy the future action of the judicial... officials..." 3 A CORBIN, supra 297, § 624, at 4 (emphasis added).

357. Ricketts, 153 F.2d at 762 n.6.

358. Id. at 762 (citing 1 WILLISTON, supra note 25, § 23, at 52).

359. Ricketts, 153 F.2d at 762 n.15. "Williston, to whom all subjectivity was anathema..." Id. (citing Williston, supra note 45, at 525, 532, 534).

360. Ricketts, 153 F.2d at 763 n.21 (quoting Cohen, supra note 348, at 840 (noting that Williston was not "interested in the ethical aspects of contractual liability, [and if he was] he would undoubtedly offer a significant account of human values and social costs involved in different types of agreements and in the means of their enforcement" Id. at 841)).

361. Ricketts, 153 F.2d at 764 n.22.

362. See Summers, supra note 20, at 875 (discussing how the substantive content of the law is "necessarily determined by values").

363. Ricketts, 153 F.2d at 764 n.22 (quoting P.W. BRIDGMAN, THE INTELLIGENT INDIVIDUAL AND SOCIETY 54 (1938)).

364. See supra notes 73, 116, 182, 192, 236 and accompanying text.

365. Ricketts, 153 F.2d at 764. The pragmatic instrumentalist slant to this statement is further advanced by Judge Frank's analogy to physics: "[U]ntil the specific difficulty has been resolved [the
"courts not infrequently have departed from the objective theory when necessary to avoid what they have considered an unfair decision . . . ." 

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<tr>
<td>fairness</td>
<td>micro-management</td>
<td>“contrary to Williston and company”</td>
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Courts have partaken in "a fair interpretation . . . of the instrument . . . presumably out of tenderness for the injured plaintiffs . . . ." 

"'Modern trend . . . is to develop a special doctrine . . . for that class of cases, liberally relieving the party who signed the release." 

"'modern trend . . . is to develop a special doctrine . . . for that class of cases, liberally relieving the party who signed the release." 

"Ricketts, 153 F.2d at 764-65. 


367. Justice Cardozo gives an analogous example in explaining that substantial performance was developed to protect the breaching party from unmitigated harm. Judge Cardozo stated, "We have often applied it for the protection of builders who in trifling details and without evil purpose have departed from their contracts." CARDozo, supra note 2, at 44. For treatment of substantial performance as an "equitable doctrine," see Morgan v. Gamble, 79 A. 410 (Pa. 1911). 

368. Ricketts, 153 F.2d at 766 (emphasis omitted). 

369. See Zipporah B. Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HArV. L. REV. 465 (1987). Professor Llewellyn advocated the categorization of sales' law into merchant and non-merchant groupings in order to "distinguish the burdens imposed on merchants from those imposed on consumers." Id. at 493. Alternatively, Wiseman stated, "[H]e advocated that the law conform to a normative vision of merchant reality . . . ." Id. As a general matter, Wiseman noted, "Llewellyn was seeking to replace verbally simple unitary rules of sales law, removed from the actual facts of commercial transactions, with purposive reasoning . . . ." Id. at 492. 

370. Ricketts, 153 F.2d at 767 (alteration in original) (quoting 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2416, at 56 (Little, Brown and Co. 1981)).
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<tr>
<td>&quot;[i]n the admiralty cases, such relief has long been accorded seaman.&quot;</td>
<td>reasoning by analogy</td>
<td>Cardozo\textsuperscript{371}</td>
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<tr>
<td>&quot;the judiciary regards the ordinary employee as one who needs . . . the special protection of the courts . . .&quot;</td>
<td>&quot;inequality of bargaining&quot;/unconscionability</td>
<td>contracts of adhesion\textsuperscript{373}</td>
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<tr>
<td>&quot;economic inequality . . . means the absence of 'free bargaining'&quot;</td>
<td>freedom to contract (not free bargaining)</td>
<td>18th Century law\textsuperscript{375}</td>
</tr>
<tr>
<td>Legal rules &quot;frequently do play an important role, even if often not a controlling role . . .&quot;</td>
<td>doctrinal informalism</td>
<td>Britton v. Turner\textsuperscript{377}</td>
</tr>
<tr>
<td>&quot;courts should strive to bring [legal] rules . . . into line with intelligent social policy.&quot;</td>
<td>social instrumentalism</td>
<td>Social contract theorists\textsuperscript{379}</td>
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\textsuperscript{371} "The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy . . . . I have put first among the principles of selection to guide our choice of paths, the rule of analogy . . . ." Cardozo, supra note 2, at 30-31.

\textsuperscript{372} Rickets, 153 F.2d at 767.

\textsuperscript{373} See generally RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979) ("Weakness in the bargaining process"); Left, supra note 206 (referring to the "unconscionability clause," § 2-302 of the Uniform Commercial Code); Rakoff, supra note 19 (arguing that form terms present in adhesion contracts should be considered "presumptively unenforceable").

\textsuperscript{374} Rickets, 153 F.2d at 768 & n.41 (making favorable reference to Patterson, supra note 347, at 877 & n.53 (noting the judicial use of unconscionable as an "emotive epithet" (citing Brown v. Lamphear, 35 Vt. 252 (1862))).


\textsuperscript{376} Rickets, 153 F.2d at 768.

\textsuperscript{377} The trend away from the strict application of rules and toward doctrinal flexibility (quantum meruit) was noted in Britton v. Turner, 6 N.H. 481 (1834). "[T]hat in modern times courts have . . . relaxed from the strict rules formerly adopted . . . . That such rule in its operation may be very unequal, not to say unjust, is apparent." Id. at 483-84, 486.

\textsuperscript{378} See Rickets, 153 F.2d at 769 n.46.

\textsuperscript{379} Id.

\textsuperscript{380} Id.
“legal rules, no matter how valuable the policy they embody, are often at the mercy of the fact-determinations ... [that] often involve ineradicable subjective factors ...”

Judge Frank's lengthy analysis illustrates the complexity of the judicial mindset. He uses a number of rationales in support of an essentially simple argument. Instead of using the fiction of "mistake," the court should acknowledge that releases are to be viewed as a special category of contracts. This "special category" mandates a closer judicial scrutiny for "contract voiding" elements of inequality of bargaining and unconscionability. The opinion shows a style of judicial decision-making not wedded to any monotheistic theoretical god. Instead, Judge Frank draws upon a multiplicity of theories, principles, and norms in reaching his decision.

The trial court in *Larwin-Southern California, Inc.* dismissed a claim for specific performance because of the existence of a subjective satisfaction clause. The case involved a contract for the purchase of residential acreage and was made contingent upon the purchaser performing a feasibility and engineering study to its satisfaction. The clause provided that the purchaser's "approvals ... may be given or withheld in its sole judgment and discretion." The trial court held that the clause rendered the contract void for lacking mutuality of obligation. Upon appeal, the appellate court determined that such a subjective clause did not void the contract. It reasoned that the approval right, while subjective, was not unfettered and that the law implies a duty of good faith. The good faith requirement limited the purchaser's discretion and thus satisfied contract's mandate as prescribed in the

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381. Cardozo takes aim at legal formalism in *Outlet Embroidery Co.*: "If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided." *Outlet Embroidery Co. v. Derwent Mills*, 254 N.Y. 179, 183 (1930).

382. *Ricketts*, 153 F.2d at 769 n.46; see also *In re J.P. Linahan*, Inc., 138 F.2d 650, 652-53 (2d Cir. 1943).

doctrine of mutuality of obligation.\textsuperscript{384}

The court summarizes breach of contract cases as the determination of the "proper characterization and interpretation of the parties' intent in executing the agreement."\textsuperscript{385} In doing so, the court is paying homage to classical contract's "presentation" of contractual intent at the moment of formation. The implication of contractual intent on a given issue by an analysis of the "totality of circumstances" or by "tacit understandings"\textsuperscript{386} is recognized. "[E]xtrinsic circumstances might be available . . . which would indicate the parties' intent."\textsuperscript{387} Thus, despite the plain and clear meaning of the contract, the court held that the exercise of disapproval was to be judged "within the parameters of the duty of good faith."\textsuperscript{388}

The teleological perspective in judicial decision-making is also brought to bear. "[W]e would be acting improvidently if we failed to consider [whether the contract contains mutuality of obligation and whether its material terms are sufficiently certain to be enforced] for purposes of future judicial guidance."\textsuperscript{389} The modern trend toward enforceability and the notion of fairness plays a role in the court's "forward-looking" or result-oriented rationale. The formalism of classical contract law is discarded in favor of the "norm of enforcement": "The modern trend of the law is to favor the enforcement of contracts [and] to lean against their unenforceability because of uncertainty . . . ."\textsuperscript{390} "If it is possible [for a court] to reach a fair and just result,"\textsuperscript{391} then the uncertainty norm of classical contract should not hold sway. In place of the contract voiding rationales of uncertainty, liberal rules of construction and gap-filling devices should be utilized to salvage contracts that show

\textsuperscript{384} "That duty [of good faith] constitutes legally sufficient consideration to establish mutuality of obligation." \textit{Id.} at 59.

\textsuperscript{385} \textit{Id.} at 56; see also \textit{supra} notes 22, 91, 176.

\textsuperscript{386} \textit{See Mattei v. Hopper}, 330 P.2d 625, 627 (Cal. 1958) (en banc) (explaining that in order to determine whether there is "satisfaction" of a lease clause, a "multiplicity of factors" must be examined).

\textsuperscript{387} \textit{Larwin-Southern Cal., Inc.}, 162 Cal. Rptr. at 57. Custom and usage are noted as possible "extrinsic facts." The court explained that "custom and usage within the trade . . . may properly be used in clarifying what, on the face of a contract, appears to be an ambiguity." \textit{Id.}

\textsuperscript{388} \textit{Id.} at 59.

\textsuperscript{389} \textit{Id.} at 57.

\textsuperscript{390} Burrow v. Timmsen, 35 Cal. Rptr. 668, 671 (Dist. Ct. App. 1963); \textit{see also Masterson v. Sine}, 436 P.2d 561, 563-64 (Cal. 1968) (en banc).

\textsuperscript{391} \textit{Larwin-Southern Cal., Inc.}, 162 Cal. Rptr. at 60 (quoting 1 \textit{CORBIN, supra} note 297, § 95, at 400).
a reasonable modicum of contractual intent.392

B. Satisfaction: The Doctrine of Substantial Performance

The rejection of performance as unsatisfactory has other limiting doctrines, one of which is the doctrine of substantial performance.393 Substantial performance is a not so distant cousin of the reasonable person: "As a matter of law, a reasonable person could not expect more than fulfillment of the contract."394 If the rejection is unreasonable, then the court will grant some relief to the performer. The doctrine of substantial performance is "remedial corrective" in nature. An unreasonable rejection is a rejection nonetheless. An unreasonable rejection does not exonerate the party who did not fully perform or who has given defective performance. Rather, the rejection will not allow the rejecting party to avoid counter-performance. The doctrine empowers the court to tailor a remedy that is appropriate to the "degree" of the breach.395 A minor defect in performance may result in a damage award or a modification of the return performance commensurate with the cost of correcting the defect or the diminution of value attributable to the defect.396 A minor defect does not permit the rejecting party to avoid counter-performance, since this would result in an injustice, nor does this

392. Professor Corbin noted the limitations of contractual intent in construction, stating that "[i]t can not be determined by finding, in some occult manner, the supposed 'intention of the parties.'" 3A CORBIN, supra note 297, § 622, at 2 (emphasis added).

393. Compare Della Ratta, Inc. v. American Better Community Developers, Inc., 380 A.2d 627, 637-38 (Md. Ct. Spec. App. 1977) (explaining that it is not a condition of the contract that must be performed but, rather, the contract itself) with Franklin E. Penny Co. v. United States, 524 F.2d 668, 677 (Ct. Cl. 1975) (refusing to apply the doctrine of substantial performance where work on the contract had been so delayed that any satisfactory use of the product was unachievable). For the inability of substantial performance doctrines to excuse an express condition precedent, see FARNSWORTH, supra note 42, § 8.3 (explaining the rule of strict compliance); see also Brown-Marx Assocs. v. Emigrant Sav. Bank, 703 F.2d 1361, 1369 (11th Cir. 1983); James Brook, Conditions of Personal Satisfaction in the Law of Contracts, 27 N.Y.L. SCH. L. REV. 103 (1981).

394. Cranetex, Inc. v. Precision Crane & Rigging, Inc., 760 S.W.2d 298, 302 (Tex. Ct. App. 1988); see also Del Monte Corp. v. Martin, 574 S.W.2d 597, 599 (Tex. Civ. App. 1978) (explaining that it would be inequitable to require "complete adherence to the letter of the contract" where it was "impossible" to adhere to the specifications).

395. One may also analyze the concept of substantial performance within the context of major-minor breach. For a general discussion on the importance of the material, or major, breach and minor breach dichotomy, see Farnsworth, supra note 20; Robert A. Hillman, Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts, 47 U. COLO. L. REV. 553 (1976).

396. "Although every breach gives rise to a claim for damages, not every claim for damages is one for damages based on all of the injured party's remaining rights to performance under the contract." RESTATEMENT (SECOND) OF CONTRACTS § 236 cmt. b (1979).
allow the rejecting party to avoid a bad bargain through rescission of the contract.

For purposes of contract avoidance, satisfactory performance is not equivalent to full or complete performance. "Substantial performance... means that the essential elements of the contract have been performed, and it is the legal equivalent of full compliance." The Cranetex court applied the doctrine of substantial performance in ruling that the rejection of the performance under a "satisfaction provision" in the contract was improper. A finding of substantial performance was conclusive as to satisfaction.

The substantial performance doctrine and the notion of material-nonmaterial breach are examples of doctrinal flexibility. These doctrines, by their nature, are less formal in their definitional content and less rigid in their operational use. The notion of materiality provides for the necessary flexibility to allow for application to all forms of contracts. Materiality "is necessarily imprecise and flexible" which allows for a wide scope of application. As with the doctrines of reliance and promissory estoppel, the courts are free to apply the substantial performance and materiality doctrines "in the light of the facts of each case."

The adequacy of the performance and the reasonableness of the dissatisfaction lends itself to a "totality of the circumstances".
analysis akin to that found in the determination of "reasonably foreseeable reliance." Justice Cardozo acknowledged the uniqueness of the circumstances of each case when he noted that "the line . . . to be drawn between the important and the trivial cannot be settled by a formula."

The lack of rigidity in the rules and of "conclusive" factors allows the courts to undertake fairness micro-management without masking it in traditional contract garb. The rigidity of the "strict compliance rule," in the area of express conditions, and the "perfect tender rule," in the sale of goods, is discarded along with the harshness that such rules inflict in particular cases. "[A] test as flexible as substantial performance sacrifices predictability to achieve justice [or fairness]."

This is an example of the on-going dialectic, in general contract law, between the use of the "rule of law" to advance the norms of certainty and predictability and the "ex contractu" norms of fairness and justice that favor ad hoc exceptions or the use of standards in place of rules. The development of the substantial performance doctrine is a specific doctrinal acceptance of fairness micro-management. One may argue that substantial performance is an example of a functional "anti-generality" principle. It is antithetical to the stern generality bias that pervades general contract law. It is a prototypical example where the harshness of rules have created the organic material in which courts have fashioned countervailing or limiting principles to mitigate the effect of law's event of "forfeiture," and the willfulness of the breach. See Farnsworth, supra note 42, § 8.12; see also U.C.C. §§ 2-608, -612 (1995) (notion of "substantiality"); cf. id. § 2-601 (setting forth options to buyer in event seller's actions do not conform to contract, otherwise known as "perfect tender rule" in the sale of goods). 406. See Restatement (Second) of Contracts § 90 (1979).

407. Jacob & Youngs v. Kent, 129 N.E. 889, 891 (N.Y. 1921). Some courts have looked at the percentage of completion as one gauge to determine substantial performance. In finding substantial performance, a 1989 Ohio appellate court took into consideration the trial court's determination that the cost of work needed for completion "constituted less than five percent of the entire contract price, which established ninety-five percent completion." Cleveland Neighborhood Health Servs., Inc. v. St. Clair Builders, Inc., 582 N.E.2d 640, 644 (Oh. Ct. App. 1989); see also County Asphalt Paving Co. v. 1861 Group, 851 S.W.2d 577, 580-81 (Mo. Ct. App. 1993) (finding the type of asphalt used in excavation and paving contracts deviated enough from contract specifications so as not to be considered a substantial performance).

408. See Farnsworth, supra note 42, § 8.3, at 571 (citing 5 Williston, supra note 25, § 669).

409. U.C.C. § 2-601 (1995). Karl Llewellyn proposed that a substantial performance rule should replace the perfect tender rule in sales law. One commentator noted, "Llewellyn's proposal of a substantial performance rule in merchant sales is a clear example of his concern for fairness and good faith in merchant transactions." Wiseman, supra note 369, at 510 (emphasis added).

410. Farnsworth, supra note 42, § 8.12, at 617 (emphasis added).

http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss2/8
generality in a particular case. Injustice and unfairness of result can only be rationalized under the rubric of generality, predictability, and certainty for so long. The end-result has normally been a doctrinal upheaval that condones a greater degree of judicial discretion on behalf of fairness and justice. The substantial performance doctrine is a case in point.\footnote{Historically, a lease was considered personal in nature. The landlord...}

C. Satisfaction: Assignment of Lease

Freedom of contract has given way to fairness and reasonableness norms in the area of assignment of leases.\footnote{Professor Farnsworth explains that the substantial performance doctrine evolved “to mitigate the harsh effects of the rules traditionally applied to express conditions.” Id. § 8.12, at 616; see also Boone v. Eye, 126 Eng. Rep. 160 (C.P. 1777). In commenting on the doctrine of substantial performance, Justice Cardozo stated, “I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it with the halo of conformity to precedent.” CARDOZO, supra note 2, at 44-45.} May a landlord and tenant expressly agree that the landlord shall have absolute discretion in consenting to an assignment by the tenant? The Restatement (Second) of Property states that such consent “cannot be withheld unreasonably.”\footnote{See RALPH E. BOYER ET AL., THE LAW OF PROPERTY § 9.10 (4th ed. 1991); ROGER A. CUNNINGHAM ET. AL., THE LAW OF PROPERTY § 6.71 (2d ed. 1993); Campbell v. Westdahl, 715 P.2d 288, 293 (Ariz. Ct. App. 1985); Jack Frost Sales, Inc. v. Harris Trust & Sav. Bank, 433 N.E.2d 941, 949 (Ill. App. Ct. 1982). Contra Reynolds v. McCullough, 739 S.W.2d 424, 428 (Tex. Ct. App. 1987) (“In the usual case, the parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement, and this purpose should not be thwarted except in the plainest case of necessary repugnance.”).} As with most satisfaction clauses, freedom of contract in the area of lease assignments has been overridden by a fairness norm. The courts have determined that an implied term of reasonableness is superior to an express lease term granting the landlord an absolute right of consent or dissatisfaction. Leases are presumed to be assignable unless the landlord can give a good faith or commercially reasonable reason for withholding consent. This rule has been applied in cases in which the lease specifically precludes assignment.\footnote{See, e.g., Fernandez v. Vazquez, 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981); see also Murray S. Levin, Withholding Consent to Assignment: The Changing Rights of the Commercial Landlord, 30 DEPAuL L. REV. 109, 121 (1980) (“[E]ven where the lease provides an approval clause, a landlord may not unreasonably and capriciously withhold his consent.” (quoting Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1038 (Ala. 1977))). A number of states have codified the implied term of commercial reasonableness in the area of lease assignment. See, e.g., ALASKA STAT. § 34.03.060 (1975); DEL. CODE ANN. tit. 25, § 5512(b) (1974); HAW. REV. STAT. § 516-63 (1985); N.Y. REAL PROP. LAW § 226-b (McKinney 1982).}

Historically, a lease was considered personal in nature. The landlord...
had the right to determine the party to whom her premises were to be leased. Over time, the courts have recognized the changing nature of lease contracts. The court in *Fernandez v. Vazquez*\(^4\) noted a number of reasons for the evolution of the principle that “consent not to be unreasonably withheld.”\(^4\)\(^6\) The court recognized the increased prominence of the “general contract principles of good faith and commercial reasonableness”\(^4\)\(^17\) as devices to prevent injustice in landlord-tenant relations. Secondly, a balancing or factors test is available to courts “in applying the standards of good faith and commercial reasonableness.”\(^4\)\(^18\) The ability to state objectively the reasons for withholding consent, as in dissatisfaction of performance, grants to the courts doctrinal authority to undertake fairness micro-management. Fairness concerns are usually viewed as anathema to doctrine and formalism. In the areas of satisfaction and assignments, both the “rule of law” and fairness have been embodied within mainstream doctrine.

The decision in *Kendall v. Ernest Pestana, Inc.*\(^4\)\(^19\) was premised upon the changing nature of the law. Implicit in this change is the notion that a doctrine, which was once aligned with notions of fairness, may have to be modified or extinguished given the changing milieu of legal relations. The adoption of reasonableness is a reflection of the changing nature of lease assignment law from that of real property law to that of contract law. There is “an increasing recognition of the contractual nature of leases and the implications in terms of contractual duties that flow therefrom.”\(^4\)\(^20\) In disregarding the majority view, the court states that the “vitality [of the common law] can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it.”\(^4\)\(^21\) The conversion of lease

\(^4\)\(^16\) See id. at 1173-74; accord *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 427 N.W.2d 50, 54 (Neb. 1988) (noting that the factors which a court may weigh in determining reasonableness of consent include financial responsibility, suitability, legality, need for alteration, and nature of the occupancy).
\(^4\)\(^17\) *Fernandez*, 397 So. 2d at 1174.
\(^4\)\(^18\) Id. (proposing a list of five factors to be considered: financial responsibility, suitability, legality, need for alteration, and nature of the occupancy); see also *DiMatteo*, supra note 297, at 441-42.
\(^4\)\(^19\) 709 P.2d 837 (Cal. 1985) (en banc).
\(^4\)\(^20\) Id. at 847; see also *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974) (en banc) (“California courts have increasingly recognized the largely contractual nature of contemporary lease agreements and have frequently analyzed such leases’ terms pursuant to contractual principles.”).
\(^4\)\(^21\) *Kendall*, 709 P.2d at 847 (alteration in original) (quoting *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 676 (Cal. 1974) (en banc)).
assignments from the domain of freedom to contract to that of a fairness inquiry is an example of the incursion of the fairness norm into formalism’s rule of law.

D. Satisfaction: Assignment of Personal Service Contracts

The general common law rule holds that personal service contracts are not assignable. A party has a right to determine with whom she wants to contract. A corollary principle is that, given this freedom of contract, one has the right to reject a performance by an assignee of the contract. Professor Grismore succinctly stated the early common law rule:

Since a contract is essentially a personal relationship voluntarily entered into by the parties to it, it follows as a logical deduction that one of the parties should not be allowed to destroy that relationship by introducing a third person into it in his place without the consent of the other party.423

A duty created by a personal service contract is per se nondelegable. The Seventh Circuit, in Sally Beauty Co. v. Nexxus Products Co.,424 states that “[t]here is no inquiry into whether the delegate is as skilled or worthy of trust and confidence as the original obligor.”425 In short, satisfaction of performance is irrelevant in a personal service contract as it pertains to the issue of assignability.426 The obligee can withhold consent to the assignment and reject any performance by the assignee no matter how satisfactorily it is performed.

The removal of the per se rule of nonassignability would satisfy both freedom of contract and fairness norms. One may argue that a corollary principle to freedom of contract is free assignability. If a contract fails to preclude assignment, then a party should be able to sell her rights and delegate her duties. The obligee can be protected in a number of ways. First, the assignment does not and should not remove

422. A “personal [service] contract” is a “contract . . . which so far involves the element of personal knowledge or skill or personal confidence that it can be performed only by the person with whom made.” BLACK’S LAW DICTIONARY 324 (6th ed. 1990).
424. 801 F.2d 1001 (7th Cir. 1986).
425. Id. at 1008.
426. The word “assignment” for my purposes shall be defined to include both the assignment of rights and the delegation of duties. See CALAMARI & PERILLO, supra note 46, § 18-1 (explaining that lawyers often use “assignment” and “delegate” interchangeably). See generally U.C.C. § 2-210(4) (1995); RESTATEMENT (SECOND) OF CONTRACTS § 328 (1979).
the obligor-assignor from primary liability. Second, the expectations of the obligee shall provide the basis for determining whether the substituted performance is satisfactory. For example, does the assignment adversely affect the interests of the nonassigning party? If not, then an assignment without consent should be allowed. A number of courts have taken this view and, in doing so, have begun to narrow the scope of the per se rule. One court held that a television anchorman's employment contract was assignable because it did not "vary materially the duty of the obligor, increase materially the burden of risk imposed by the contract, or impair materially the obligor's chance of obtaining return performance." The fairness norm is also advanced because the per se rule precludes judicial inquiry into the reasonableness of the obligee's rejection of the substituted performance or the substituted performer. The primary rationale for the per se rule has been the protection of the expectations of the obligee. Elimination of the per se rule will allow the courts to also take into account the interests of the obligor and the innocent third party assignee. The considerations that were discussed in the previous section on the assignment of leases can also be applied to the assignment of personal service contracts. Consent to the contract assignment or to the acceptance of the third party performance "may not be arbitrarily or unreasonably refused." The rendering of a satisfactory performance should be the measuring stick for the reasonableness of withholding consent to the assignment.

A presumption in favor of assignability can be supported by a number of rationales. First, it would bring this area into conformity with the general rule of assignability and the public policy in favor of "free alienability." The history of the movement of the demarcation between personal and nonpersonal contracts has been "one of piecemeal reform." The removal of this exception to assignability would

429. See supra notes 412-21 and accompanying text.
431. See generally CALAMARI & PERILLO, supra note 46, §§ 18-2 to -3 (explaining that "[t]he free alienability of [certain] assets is essential to commerce").
provide greater “uniformity and certainty in commercial transactions.” Secondly, the size and the nature of modern commercial transactions are far removed from the early common law days where most contracts formalized purely one to one relationships. It is often difficult to find the “personal” in personal service contracts when services have taken on the standardized and interchangeable nature that characterizes transactions in goods. There has been an increase in fungibility in commercial transactions, along with an increase in the sophistication of the parties. Third, the parties should be responsible for negotiating express and detailed nonassignability clauses into their contracts.

A fourth rationale in support of freer assignability can be found in the “new spirit of contract.” “Every contract imposes upon each party a duty of good faith and fair dealing . . . .” The use of a presumption of assignability would be a way of requiring the obligee to give a “good faith” reason for its dissatisfaction with the substituted performance. The practical and philosophical differences of long-term relational contracts further emphasizes the importance of the duty of

434. See, e.g., Peter J. Bishop, The Modern Employment Contract, 12 ADVOCS. Q. 245 (1990) (explaining that traditional principles of contract law are not sufficient to deal with modern employment relationships); Egan, supra note 68, at 312 (“The complexity of most modern agreements insures that such agreements will rarely be fully completed.”); see also In re Compass Van & Storage Corp., 65 B.R. 1007 (Bankr. E.D.N.Y. 1986) (explaining that if a bankruptcy trustee could not assign the contract of a debtor, the submitted reorganization would likely fail); Schultz v. Ingram, 248 S.E.2d 345 (N.C. Ct. App. 1978) (declining to either categorize two years as an unreasonable length of time or designation of southeastern area of the United States as too vague when interpreting provisions of contract).
436. A sample test for fungibility could be the availability of substitute performance. See, e.g., In re Da-Sota Elevator Co., 939 F.2d 654, 656 (8th Cir. 1991) (noting that a substitute can be found, with relative ease, for elevator maintenance, a “routine commercial function”); Pingley v. Brunson, 252 S.E.2d 560, 561 (S.C. 1979) (explaining that, even if an organist is talented, it is not the type of performance which consists of “unique and exceptional skill or ability” and does not warrant a decree of specific performance).
438. See supra notes 105-11 and accompanying text. See generally Speidel, supra note 22.
good faith and of free assignability. Professor Hillman argues for the
duty to adjust long-term contracts in two instances.440 “The first
situation calling for adjustment...[is] when the supplier reasonably
expects the buyer to adjust in case of a serious disruption.”441 This is
promised upon an implicit risk-allocation between parties to a long-term
business relationship based upon a number of variables such as trust,
confidence, and prior dealings. It is a reflection of the “‘relational’
realities of many contract settings.”442 The second situation calling for
adjustment involves unexpected occurrences for which the parties failed,
expressly or implicitly, to allocate the risk.443 “[T]he fairness principle
[dictates] that the parties should agree to share unallocated losses.”444

An assignment by an obligor could be considered an “unanticipated
change”445 and place upon the obligee the good faith “duty to ad-
just.”446 Instead of allowing one party the absolute right to treat the
assignment as a breach, the parties should attempt to negotiate in order
to retain the essence of the contract.447 In the words of Professor
Macneil, this would prevent the “bad faith...‘abuse’ [of] the power to
terminate a contract.”448 Such a duty to adjust by way of negotiation

440. See Robert A. Hillman, Court Adjustment of Long-Term Contracts: An Analysis under
Modern Contract Law, 1987 DUKE L.J. 1, 4, 15.
441. Id. at 3; see also John P. Dawson, Judicial Revision of Frustrated Contracts: Germany,
63 B.U. L. REV. 1039 (1983) (describing German “adjustment” procedures in contract disputes which
demonstrate the German system’s divergence from Anglo-American tradition); Robert A. Hillman,
An Analysis of the Cessation of Contractual Relations, 68 CORNELL L. REV. 617 (1983) (discussing
fairness reasons as the only justifications for cessation of contract). Contra Dawson, supra note 287
(discussing the lack of use of the “adjustment” procedure by American courts and, additionally, its
limited application to partially performed contracts); Clayton P. Gillette, Commercial Rationality and
the Duty to Adjust Long-Term Contracts, 69 MINN. L. REV. 521 (1985). Gillette states:
My belief that moral notions...do not justify an obligation to adjust also leads me to
conclude that we must respect bargains struck through individual negotiation. The issue
is not whether individuals will suffer harsh results from such a legal rule; on occasion,
they will. The issue is whether we can do better by acting through the law....I
conclude that we cannot.

Id. at 585.
442. Hillman, supra note 440, at 3; see also Macneil, supra note 169, at 725.
443. Professor Hillman refers to this as the “gap model.” Hillman, supra note 440, at 14-17.
444. Id. at 3 (emphasis added).
445. “[A] duty to bargain should be imposed when unanticipated changes occur during the
446. See supra notes 441-42 and accompanying text.
447. For example, the obligee could negotiate “reasonable assurances” of performance in
exchange for her consent to the assignment. Other examples of the use of the principle of “adequate
assurance” can be found elsewhere in the law. See, e.g., 11 U.S.C. §§ 365(b), (f)(2) (1994)
448. Macneil, supra note 169, at 722.
or that failing, by way of a court imposed adjustment, would serve the sanctity of contract and advance the cause embodied in the “fairness principle.”

E. Judicial Micro-Management: Adjustments to Covenants Not to Compete

One area where courts have been openly “interfering” with the express terms of contracts is in the enforcement of covenants not to compete. Professor Farnsworth declares that “[n]owhere has judicial paternalism in the service of public policy been more at war with judicial laissez faire in the name of freedom of contract.” Courts will often modify or micro-manage the express terms of the covenants as to their scope, subject matter, duration, and geographical area. Professor Hillman notes that the courts have long adjusted contracts using fairness, justice, and reasonableness as guideposts. “[C]ourts, using their equity powers, have a tradition of adjusting contracts. For example, courts have long whittled away at covenants not to compete, adjusting the duration, area, and substance of such promises.” “Equity powers” are the code words for “rule avoidance” on behalf of the attainment of fairness or justice in a given case. Equity has been defined as “[j]ustice administered

449. The fairness norm is aided in a number of ways. First, the elimination of the per se rule would allow the interests of the obligor and the assignee to be entered into the assignment equation. Second, it is inconsistent with the duty to mitigate found elsewhere in the law of contracts. Consent to the assignment (coupled with a right to sue for damages) may better satisfy the principle of mitigation as compared to a termination of contract coupled with a suit for expectation damages.

450. The Second Restatement lists three types of covenants not to compete: (1) covenants appurtenant to the sale of a business; (2) covenants by an employee or an agent; and (3) covenants between a partner and a partnership. RESTATEMENT (SECOND) OF CONTRACTS § 188(2) (1979). See generally Harlan M. Blake, Employee Agreements Not to Compete, 73 HARV. L. REV. 625 (1960) (noting a recognition by employers that courts are increasingly refusing to enforce employee agreements not to compete). For an alternative ground suggesting that such clauses be challenged, see Harvey J. Goldschmid, Antitrust’s Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law, 73 COLUM. L. REV. 1193 (1973).


452. Professor Farnsworth explains the triad of limitations that courts scrutinize in determining the reasonableness of covenants not to compete. “The scope of the restraint has three aspects: type of activity, geographical area, and time. If a covenant not to compete proscribes types of activity that in any of these respects go beyond those necessary to protect the legitimate interests of the promisee, it is unreasonable.” Id. § 5.3, at 361-62 (footnote omitted); see also Burgess v. Permain Court Reporters, Inc., 864 S.W.2d 725, 727 (Tex. Ct. App. 1993). The required reasonableness of restraints upon time, area, and scope of activity have been codified in a number of states. See, e.g., TEX. BUS. & COM. CODE ANN. § 15.51(c) (West 1993).

according to fairness as contrasted with the strictly formulated rules of common law. . . . The term ‘equity’ denotes the spirit and habit of fairness, justness, and right dealing. . . .

In the 1993 case of New River Media Group, Inc. v. Knighton, the Supreme Court of Virginia adopted a “three-part test” that must be satisfied for a covenant to meet the law’s reasonableness and fairness standard. First, is the covenant “no greater than is necessary to protect the [benefitting party] in some legitimate business interest?” Second, is the covenant “not unduly harsh and oppressive” on the adverse party? Third, the court looks to whether “the restraint [is] reasonable from the standpoint of a sound public policy?”

The court held that an employer-employee noncompetition agreement, barring the employee from engaging in a similar occupation within a sixty mile radius of the employer and for a period of twelve months from the termination of employment, met all three parts of the reasonableness test. In other cases, the courts have felt free to void or rewrite “unfair” restraints. For example, the court in Chavers v. Copy Products Co. held that a noncompetition agreement, prohibiting a copier repair person from working in that field for two years, was an “undue hardship.” The concern for fairness is implicit in most judicial reformations of covenants not to compete. “Because post-employment restraints are often the product of unequal bargaining power and may inflict unanticipated hardship on the employee, they are scrutinized with more care than are covenants in the sale of a business.”

456. Id. at 26; see also Clark v. Liberty Nat’l Life Ins. Co., 592 So. 2d 564, 565-66 (Ala. 1992) (citing to Alabama law which demands reasonableness, both to restriction relating to the interest and to the time and place, in order for the covenant to be enforced).
458. Id. Restraints on competition have generally been viewed as against public policy. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 187, 188 cmt. c (1979).
459. Some of the factors weighed by the court include the type of occupation (radio disc jockey), that the sixty mile radius was based upon the broadcast reach of the station, that a good faith consideration was paid (two thousand dollars), and that the station had “invested substantial time and money in promoting [the employee] as an air personality.” New River Media Group, Inc., 429 S.E.2d at 26.
460. 519 So. 2d 942 (Ala. 1988).
461. Id. at 945.
462. FARNSWORTH, supra note 42, § 5.3, at 359; see, e.g., Cooper v. Gidden, 515 So. 2d 900, 905 (Miss. 1987) (explaining that a covenant dealing with the sale of a business’s goodwill will be scrutinized to "a lesser degree" than will an employee-employer covenant).
F. The "Best Efforts" Doctrine

The "best efforts" doctrine is a doctrine of construction and implication.\(^{463}\) It is also one of performance and satisfaction. The seminal case, via Justice Cardozo, is the 1917 case of *Wood v. Lucy, Lady Duff-Gordon*.\(^{464}\) The case involved an "exclusive agency" agreement whereby an agent obtained the exclusive right to represent and procure endorsements for a well-known celebrity. After breaching the agreement, the celebrity defendant argued that the prospective contract was invalid for want of "mutuality of obligation.”\(^{465}\) The contract was silent regarding the responsibilities and duties to be provided by the agent. There was no specific language obligating the agent to actually make any effort to procure endorsements on behalf of Duff-Gordon. The court salvaged the contract by implying that the promisor was under a duty to use "reasonable efforts.” The rationale employed by the court was the same as that often used to uphold satisfaction clauses: "We are not to suppose that one party was to be placed at the mercy of the other."\(^{466}\)

The best efforts doctrine was designed to be centripetal in nature. It was intended to overcome claims of illusory consideration and bind parties to their contracts.\(^{467}\) However, it may possess a centrifugal force.

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\(^{464}\) 118 N.E. 214 (N.Y. 1917).

\(^{465}\) See id. at 214. For illustrative discussions concerning "mutuality of obligation," see 1A CORBIN, supra note 297, § 152; FARNSWORTH, supra note 42, § 3.2.

\(^{466}\) Wood, 118 N.E. at 214. A review of a Cardozo opinion would be remiss without an appreciation of his special brand of "poetry." In explaining the need to imply contractual terms and duties, Cardozo recites that "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." Id.

\(^{467}\) This is analogous to the implication of "good faith" to save contracts with satisfaction clauses from illusory claims. "Approval or satisfaction clauses ... often give rise to arguments that the agreement is too vague or illusory. ... Mutuality of obligation is an essential element of every enforceable agreement." Chadd v. Midwest Franchise Corp., 412 N.W.2d 453, 457 (Neb. 1987) (emphasis added) (citation omitted); see also De Los Santos v. Great W. Sugar Co., 348 N.W.2d 842, 845 (Neb. 1984).
in the event that the promisee elects to use the best efforts standard as a tool to terminate the contract. One may argue that the "best efforts" doctrine is a type of implied satisfaction clause. By implying a best efforts obligation in order to save the contract from a claim of being illusory,\textsuperscript{468} the courts have also set a standard to judge performance. The promisee has by implication been given a right of termination. If the performance can be judged as falling below that of best efforts, then the promisee may reject it as being unsatisfactory.

The notion of best efforts has been extended to other types of contracts. For example, "best efforts" have been implied into commercial leases in which the rental payment is based upon a percentage of sales or revenues. The court in \textit{Slidell Investment Co. v. City Products Corp.}\textsuperscript{469} held that a percentage lease implied a duty of "continuous operations."\textsuperscript{470} The \textit{Restatement (Second) of Contracts} speaks of the "spirit of the bargain."\textsuperscript{471} Terms and duties are to be interpreted and implied which empower the contract to fulfill the spirit of the bargain. To do otherwise is to condone bad faith. "[B]ad faith [includes] evasion of the spirit of the bargain, lack of diligence and slacking off, [and] willfull rendering of imperfect performance . . . ."\textsuperscript{472} The desire for satisfactory performance and the ancillary doctrine of best efforts can be found at the core of this notion of the spirit of the bargain.

Underlying the "spirit of the bargain" and its embodiment in such doctrines like "best efforts" is the notion of fairness. In the past, courts have undertaken creative interpretation and "purposive reading"\textsuperscript{473} to find the necessary language within the contract. The best efforts doctrine is an example where the fairness norm is advanced without the charade of linguistic construction. The break with the formalism of the past is evident in the \textit{Restatement}: "[T]he court should supply a term which comports with community standards of fairness and policy rather than

\begin{itemize}
\item \textsuperscript{468} See generally \textsc{Calamari & Perillo}, supra note 46, § 4-12(c)(4); \textsc{Corbin}, supra note 297, § 16; \textsc{Farnsworth}, supra note 42, § 2.13; see also \textsc{Kays v. Brack}, 350 F. Supp. 1243, 1246 (D. Idaho 1972) (holding that a "best effort" constituted a detriment and provided sufficient consideration).

\item \textsuperscript{469} 202 So. 2d 323 (La. Ct. App.), \textit{writ denied}, 204 So. 2d 572 (La. 1967).

\item \textsuperscript{470} \textit{Id.} at 325; see also \textit{United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.} 413 S.E.2d 866, 868-69 (S.C. Ct. App. 1992) (interpreting an express best efforts clause). \textit{Contra} \textit{Food Fair Stores, Inc. v. Blumberg}, 200 A.2d 166, 174 (Md. 1964) (stating that all contracts have implicit covenants that parties will act in good faith and deal fairly).

\item \textsuperscript{471} \textit{Restatement (Second) of Contracts} § 205 cmt. d (1979).

\item \textsuperscript{472} \textit{Id.}

\item \textsuperscript{473} \textit{Id.} § 204 cmt. d.
\end{itemize}
analyze a hypothetical model of the bargaining process." Thus, the ad hoc fairness inquiry has a strong ally in the Restatement and Uniform Commercial Code’s notion of “good faith.” The fairness norm and reasonable satisfaction can now find support both in law and in equity.

G. Judicial Satisfaction: Plea Bargaining as Contract

Criminal law gives us a unique example of a three-party determination of satisfaction in contract. The plea bargaining process requires agreement between the two contract parties, the accused and the prosecutor, and approval by the court. The acceptance of plea bargains as within the boundary of contract law has been widely accepted. The Seventh Circuit, in the 1992 case of *Carnine v. United States,* stated that it “regards plea agreements as contracts conferring all of the attendant rights and obligations governed by ordinary principles of contract law.” However, it did recognize that they are “unique contracts” with additional fairness concerns. The courts are likely to pursue a heightened fairness inquiry in the case of a breach of a plea contract. First, it is likely to place a greater responsibility upon the prosecutor to avoid drafting ambiguous bargains. Second, in case of disagreement, the plea contract is to be construed against the government. “A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language.”

The court in *United States v. Ataya* applied freedom of contract norms along with some Kantian rationality. The defendant was described with plea agreements, “special due process concerns for fairness and the adequacy of procedural safeguards obtain.” See, e.g., *United States v. Bielak,* 660 F. Supp. 818, 826 (N.D. Ind. 1987) (stating that “the Government is to be held to the literal terms of a plea agreement”).
as a rational and moral agent, free to enter into an exchange of risk.\textsuperscript{484} The court stated that "[a]s a rational agent, the defendant must be presumed to be capable of freely choosing . . . . As a moral agent, the defendant is responsible for these free choices."\textsuperscript{485} The court held that the defendant's failure to fully cooperate was a "substantial breach" of the government's "reasonable expectations."\textsuperscript{486} It has been asserted that the foundation for "plea bargaining as contract" is the "norm of expanded choice."\textsuperscript{487} Expanded choice is the normative capstone of freedom of contract's notions of efficiency and autonomy. "The normative claim that supports enforcing bargains is that voluntary exchange offers people more choices than they would otherwise enjoy . . . ."\textsuperscript{488} One goal of the fairness inquiry is to ensure that the choice was freely and fairly made.

\textit{H. Comfort Instruments: Advancing the Frontier of Reliance}

The importance of fairness is also apparent in the area of noncontractual or "quasi-contractual" liability.\textsuperscript{489} Generally, barring a finding of unjust enrichment, courts have been reluctant to extend reliance liability to instruments that do not possess the required formalities of contract, such as clear contractual intent.\textsuperscript{490} Some courts have begun to extend the doctrine of reliance into areas of "noncontract" that were previously exempted from contractual liability. The courts have found it

\textsuperscript{484} See \textit{id.} at 1332-33. One may argue that a plea bargain is a contract that allocates the risk between the two parties. The defendant is avoiding the risk of a conviction and a harsher sentence. The prosecutor is avoiding the risk of an acquittal, along with the transaction costs involved in a trial.

\textsuperscript{485} \textit{id.} at 1332-33.

\textsuperscript{486} \textit{id.} at 1330.


\textsuperscript{488} \textit{id.} at 1918.

\textsuperscript{489} Corbin states that a "quasi contractual obligation is one that is created by the law for reasons of justice." 1 \textit{Corbin}, \textit{supra} note 297, § 19, at 46. The major theme in most quasi-contract cases is "unjust enrichment." See, e.g., Wood v. Ayres, 39 Mich. 345, 348-49 (1878). See generally Arthur L. Corbin, \textit{Quasi-Contractual Obligations}, 21 \textit{Yale L.J.} 533 (1912) (discussing the obligations arising out of contract and the difficulty of placing "legal" classifications upon them).

difficult to avoid granting relief where there has been fair or reasonable reliance upon another's representation. This is true even when an element of contract is clearly missing. One may argue that the entire law of restitution or quantum meruit is an example of this judicial temptation to compensate injury. "Recovery under [quantum meruit] is derived from the principles of equity and fairness ..."491 Some courts have begun to expand reliance recovery into areas where a "formal" contract has not been rendered.

One type of legal hybrid that has grown in popularity is the "comfort instrument."492 A comfort instrument is normally given by a "third party" to assure a party to a transaction regarding some element of value or credit. The third party intends to provide an incentive for one of the principals to enter into the transaction, while not becoming legally responsible itself. The comfort instrument can be found in numerous fields of business and finance. They are generally viewed as not creating any legally enforceable obligations. For example, a parent company who wants to avoid being a guarantor will often issue a letter to a lending institution contemplating the extension of credit to a subsidiary of the parent company. The "comfort letter" attempts to provide assurance without the resultant guaranty-type of liability. As these instruments have become more widely used, a growing cadre of cases questioning their nonenforceability has developed. A number of cases, mostly foreign, have begun to lay a doctrinal foundation for the assessment of liability against the letter issuer.493

An interesting paradox can be seen as more and more cases arguing for enforceability have come to trial. Initially comfort letters were vaguely written and generally regarded by the business community as unenforceable. As these instruments continued to grow in use, they


492. There is no generally agreed upon definition of the term "comfort instrument." One commentator sarcastically states that "[c]omfort letters are a species of those ambiguous declarations which negotiators often use to save a deal threatened by lack of agreement on an important point. ... It is a lawyer's cover-up of a disagreement." A.H. Hermann, Real Comfort in a Comfort Letter, FIN. TIMES, Feb. 4, 1988, at A13. Instruments intended to provide "comfort" include letters of assurance, letters of intent, accountants' comfort letters or certifications, and attorney opinion letters.

became more detailed in content and more guaranty-like in nature. Will this growing "custom" dictate a new jurisprudence of enforceability? As more detailed representations are added to the content of the instrument, there will be a greater chance of a court undertaking a contractual analysis. One commentator states it more pragmatically: Drafters of comfort letters may "provid[e] detail in the letters which, to an attorney, offer considerable factual representations and promises on which to argue detrimental reliance." In the 1991 case of Bank of New Zealand v. Ginivan, the New Zealand Court of Appeals held that such a letter "suggest[s] an obligation of a legally binding nature." The court focused upon the words "best endeavours" in the letter as implying an intent that went beyond simple assurance.

A number of courts have looked outside the language of the comfort instrument to determine if contractual intent and liability may be implied. I submit that this is in essence a fairness inquiry. Given the "totality of the circumstances" and of the nature of the relationship, it is inherently unfair to allow a party to avoid liability for issuing a letter that was reasonably relied upon by another to its detriment. Contractual formality and formalism would preclude such an inquiry. The argument for the extension of legally recognizable reliance may be strongest for long-term contractual relationships. A party may argue that the comfort instrument was part of an ongoing, expansive "contract." The Restatement (Second) of Contracts encourages the expanded use of promissory estoppel to prevent injustice. The Second Restatement "permits reference to the negotiations of the parties, including statements of intention and even positive promises. . . . The transaction may be shown in all its length and breadth . . ." One can no longer assert that such instruments, devoid of the "operative terms" of contract, are wholly unenfor-

494. See Phoenix Mut. Life Ins., 734 F. Supp. at 1187 (stating that "the custom of such [a] transaction[]" is a factor in determining contractual intent). As financial institutions demand comfort instruments as a customary requirement, more detailed representations, and stronger assurance language, a case for contractual significant reliance can more easily be made.


498. Braucher, supra note 111, at 16-17; see also Knapp, supra note 108, at 78-79.

499. "Operative terms or phrases" are terms of art that have specifically and universally accepted meanings within the law or within a trade or profession. For example, the court in Chemco Leasing Spa v. Rediffusion held that "take over" of a subsidiary's obligations was such an operative
ceable. In pursuit of fairness and justice, a court may indeed imply such terms "in the light of the circumstances." In England, the Court of Appeals, in Corson v. Rhuddlan Borough Council, seemed to accept this mandate. "It is accordingly the duty of the court to construe [the] documents fairly and broadly without being too astute or subtle at finding defects."

Comfort instrument enforceability is another example of the easing of the strict bargain principle of contract law and the corresponding growth of equitable principles in the realm of contract law. Reliance induced by the issuance of the comfort instrument may result in a finding of contractual liability even if it was not "bargained for" reliance. This expanded analysis takes into consideration the "equities" of the overall transaction. It may also include consideration of how subsequent events may call for an equitable reformation of the instrument in question. In reviewing contract norms, Professor Macneil states that "just as a mountain changes shape and color as one approaches it ever closer and shuts out other vistas, so too the common norms oriented toward discreetness take on new characteristics as they more and more dominate the contract landscape." It is in this moving landscape that comfort instruments and the fairness inquiry continue to evolve.

I. Summary

The "spirit of contract" has evolved into a greater awareness of fairness concerns in individual cases. This ad hoc inquiry was once shunned in the era of freedom of contract and formalistic rule phrase sufficient to bind the parent company as a promisor or guarantor. Queen's Bench (Commercial Court) (Transcript Assoc. 1985), available in LEXIS, INTLAW Library, ENGCAS File. Words of promise include "agree" and "undertake." Words of guarantee include "indemnify," "hold harmless," and "reimburse."

502. Id. at 192 (emphasis added) (quoting Hillas & Co. v. Arcos, 147 L.T.R. 503, 514 (H.L. 1932)).
503. See generally Egan, supra note 68.
504. MACNEIL, supra note 22, at 60.
505. Professor Williston traces the genesis of "freedom of contract" to the late eighteenth century's philosophy of freedom as symbolized by Jeffersonian democracy. "A gospel of freedom was preached by both metaphysical and political philosophers in the latter half of the eighteenth century." Samuel Williston, Freedom of Contract, 6 CORNELL L.Q. 365, 366 (1921). In the area of economics, the philosophy of freedom was also deeply embedded. Williston stated, "Adam Smith, Ricardo, Bentham, and John Stuart Mill successively insisted on freedom of bargaining . . . ." Id.; see also Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454, 456 (1909).
application. Instead, the law has absorbed more and more of the approach once found in the realm of equity.\textsuperscript{506} It has attempted to balance law's traditional preference for the determinacy of rules with the flexibility available in a fairness of the exchange inquiry. This fairness inquiry allows courts to venture outside the four corners of the contract in search of justice. "Moral" consideration is often considered an anathema to the finding of a legally enforceable contract. But, "moral" considerations have played a large role in defining the scope of legal obligations. Fuller's reliance has been the vehicle whereby bargained for exchange has been fundamentally altered to hold one morally and legally accountable for another's reliance.\textsuperscript{507} It seemed inherently unfair for one to escape liability for the inducement of another because contract's formalistic checklist of requirements had not been completed. Over time the "ought to" of contract was transformed to the "is" of contract. Currently, the frontier of reliance recovery is the uncertain world of comfort instruments. It may prove to be a microcosmic example of the further genesis of reliance as a foundation for contractual liability.

At first, comfort instruments were viewed as something outside the realm of legally recognizable contract. As the use and the content of these instruments began to flourish, the notion of their nonenforceability has increasingly been questioned. Once again, reliance's appeal to rectify the unfairness of unpunished inducement has been brought to bear. There is a belief that although the comfort instrument in itself is legally insignificant, it may be evidence of some underlying understanding that is deserving of protection. An English Court of Appeals has noted that, even though a lawyer would consider a guarantee worthless, ""a commercial man would regard the guarantee, perhaps furnished in a proper form of letter, as having some value as underlining, as it were, the promise that had been undertaken."\textsuperscript{508}

Some guidance for the direction of the "new spirit" of contract may be provided by current foreign law approaches. For example, the Federal Republic of Germany is less dependent upon the legal literalism often found in Anglo-American jurisprudence. The formalism of legal instruments and the language within them is not as determinative as in our legal system. An example of this informalism is reflected in the fact

\textsuperscript{506} See, e.g., Emily L. Sherwin, Law and Equity in Contract Enforcement, 50 Md. L. Rev. 253 (1991); Summers, supra note 105.

\textsuperscript{507} See Fuller, supra note 112, at 821-22.

\textsuperscript{508} Heisler v. Anglo-Dal, Ltd., 2 All E.R. 770, 772 (C.A. 1954) (quoting Barker v. M'Andrew, 144 E.R. 643 (1865)).
that a “merchant’s guarantee” is valid even if given orally.\textsuperscript{509} This legal informalism provides parties to a transaction greater flexibility in structuring their transactions and in the types of instruments they choose.\textsuperscript{510} This has direct repercussions for the enforcement and remedial side of the law. Their approach to enforcement is more consequentialist in style: “By contrast with . . . English legal doctrine, German courts favor the so-called teleological method of interpretation: rather than restricting themselves to a literal interpretation of the wording . . . , they tend to consider the purpose of the [instrument] . . . .”\textsuperscript{511} Under this “purpose-oriented” approach, the norm of reliance is likely to triumph over the formalism of rule application.

One may pose the proposition that even informal letters of comfort, seemingly not binding on their surface, are more likely to be taken “seriously” under this purpose-oriented jurisprudence. French law approaches the issue of the efficacy of such instruments in a direct, commonsensible way. Would two sophisticated commercial entities create a meaningless, unenforceable instrument? The French have developed a presumption that the question should be answered in the negative. This is consistent with the European mind-set that parents do back their subsidiaries.\textsuperscript{512} Comfort instruments are thus more likely to be considered as binding “obligations de faire.”\textsuperscript{513} The interests of fairness have provided the fuel for this expansion of reliance’s realm.

This review of the “frontier” of contracts has shown that contractual certainty is more illusion than reality. The certainty of an express satisfaction clause has been undermined by the law’s objective flow. The doctrines of substantial performance and best efforts have recalibrated private contract’s measurement of satisfactory performance. Reliance has provided the mechanism to expand fairness’s reach into areas previously demarcated as noncontract. This review has been but a sampling of the use of the fairness inquiry throughout the law of contracts. One may find numerous other examples of the fairness norm at work. The courts have reviewed express liquidated damage clauses to determine if they are

\textsuperscript{509} See 1 LEGAL ASPECTS OF DOING BUSINESS IN WESTERN EUROPE 216 (Dennis Campbell ed., 1983) [hereinafter Campbell].
\textsuperscript{510} “[The parties] are at liberty to agree to variants [of accepted legal instruments] or to develop entirely new types . . . .” 1 id.
\textsuperscript{511} 1 id. at 206.
\textsuperscript{512} See Hermann, supra note 492, at A13.
\textsuperscript{513} Code Civil [C. civ.] art. 1142 (Fr.). This translates to a “commitment to perform.”
"reasonable forecasts" of damages or unfair "penalties."\textsuperscript{514} Exculpatory clauses have been voided upon grounds of "public policy"\textsuperscript{515} and "unconscionability."\textsuperscript{516} Classical contract's notion of "presentation" has been transplanted by the courts' "expanded analysis" of unforeseen developments,\textsuperscript{517} "totality of circumstances,"\textsuperscript{518} "tacit understandings,"\textsuperscript{519} fairness of the exchange,\textsuperscript{520} and notions of unconscionability and fair dealing.\textsuperscript{521}

The question posed at the end of Part I was how have courts dealt with contractual satisfaction when it affronts notions of fairness? The answer seems to be that the dictates of fairness have increasingly prevailed over "bargained for" satisfaction. However, courts have attempted to disguise their abrogation of express contract on behalf of fairness concerns. They have avoided the nomenclature of the ad hoc fairness inquiry by cloaking informalism in the garb of doctrine. The next part will attempt to distill the underlying norms of contract and fairness in order to better understand the roles of competing values in the enforcement decision.


\textsuperscript{515} "The reason for disfavoring such clauses is based upon the public policy of encouraging the exercise of reasonable care." Firstbank of Ark. v. Keeling, 850 S.W.2d 310, 313 (Ark. 1993) (citing Farmers Bank v. Perry, 787 S.W.2d 645, 646 (Ark. 1990)).

\textsuperscript{516} See Maryland-National Capital Park & Planning Comm'n v. Washington Nat'l Arena, 386 A.2d 1216 (Md. 1978). The court held, "[C]ontractual limitations on judicial remedies will be enforced, absent a positive showing of fraud, misrepresentation, overreaching, or other unconscionable conduct . . . ." Id. at 1231; see also Martin Marietta Corp. v. International Telecommunications Satellite Org., 991 F.2d 94, 99 (4th Cir. 1992). See generally Cava & Wiesner, supra note 244.


\textsuperscript{518} See supra notes 73, 82, 116.

\textsuperscript{519} See supra notes 22, 87, 169.

\textsuperscript{520} See generally Atiyah, supra note 23.

IV. THE NORMS OF CONTRACT: OPERATIVE NORMS
UTILIZED IN POLICING OF CONTRACT AND IN THE
ENFORCEMENT DECISION

Classical contract theory established a normative framework to rationalize its support for the formalism and generality of contract law. It was a theory based upon the sanctity of individual freedom. The “meeting of the minds” era and the evolution of the “bargain principle” were contract law’s corollary to our dominant political and economic theory, the doctrine of laissez faire. Professor Williston recognized this common strain running through the “theorizing in metaphysics, politics, and economics,” as well as the law. He stated, “Indeed it was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract.” Thus, the norms sheltered under the philosophy of freedom of contract began to flourish. The rationales of certainty, predictability, free will, and systemic fairness became fodder for judicial reasoning. These are the norms of individualism and formalism. More recently, the norm of free contract has been expressed in terms of the efficiency norm. This norm has been most closely associated with the widespread literature capsulized under the label of “law and economics.”

The advancement of the norms of certainty and predictability have been bound with the norm of authority. The doctrine of stare decisis

522. A “norm” has been defined as an “ought proposition.” Norms are not necessarily derived from a moral analysis. For example, both Kelsen and Austin’s systems were amoral in nature. “Kelsen’s theory is amoral because the validity of the legal norm has nothing to do with its content; it is dependent only upon the way it is created.” Kelsen, supra note 17, at 619. For a general review of the nature of norms, see Hans Kelsen, Essays in Legal and Moral Philosophy (Peter Heath trans., 1973); Joseph Raz, Practical Reason and Norms (S. Korner ed., 1975). Professor Raz explains that norm is a “term of art.” His analysis is confined to what he refers to as “categorical rules,” which he defines as “rules which require that a certain action be performed, as well as rules granting permissions.” Id. at 9.

523. “Corollary” is Latin for gratuity or gift. The word corollary is a derivative. See Webster’s New World Dictionary 311 (3d ed. 1991).

524. Williston, supra note 505, at 367.

525. Id. (emphasis added).

526. “The rule of free contract advocated by the Chicago model is closely related to the formalist norm of freedom of contract. Both hold that contracts should generally be enforced as written.” Note, supra note 175, at 979 n.7; see also Posner, Economic Analysis, supra note 167, at 186-87. See generally Milton Friedman, Capitalism and Freedom (1962) (noting that governmental involvement via legislation usually causes more problems then it solves).
provides the basis for the formal application of rules. The analytical process is truncated by the deference given to past rulings. The decision-making process became more of a procedural exercise than one of ad hoc substantive analysis. The “mechanical jurisprudence” of applying past precedent—an approach often associated with the legal positivism of John Austin—became a required exercise on behalf of certainty and predictability in the law.527 “[A] proposition of law is true within a particular . . . society if it correctly reports the past command”528 of a sovereign authority. It is this certainty and predictability that allows business people to exercise their free will in choosing or avoiding the “default rules” of contract.529 Justice Cardozo views adherence to precedent not so much as direct application, but as building upon past precedents. It is for the judge to lay his “own course of bricks on the secure foundation of the courses laid by others who had gone before him.”530

A parallel universe of norms developed that were communitarian in nature. The fiction of contractual intent continued to be a forceful factor. However, the subjective “meeting of the minds” was transplanted by the objective reasonable person standard. The norm of reasonableness swept across the contractual landscape. Actual intent was interpreted to mean “reasonable intent.” The objectification of contracts was the touchstone of twentieth century decision-making. The “reasonable person” was constructed to solve most of the problems of construction and interpretation.531 Satisfaction was thus transformed into reasonable satisfaction,

527. “The science of jurisprudence . . . is concerned with positive laws . . . as considered without regard to their goodness or badness.” THE GREAT LEGAL PHILOSOPHERS 350 (Clarence Morris ed., 1959) (alteration in original) (emphasis omitted); see also AUSTIN, supra note 79 (describing the analytical or scientific nature of law and jurisprudence).

528. RONALD DWORKIN, LAW’S EMPIRE 33 (1986) (emphasis added) (accrediting Austin with the statement).


530. CARDOZO, supra note 2, at 149.

531. The reasonable person can be configured to fit any factual situation. She is a chameleon who can change colors to provide a measure in determining if there has been a contractual breach. For example, in cases of professional services, the reasonable person is one who possesses the “skill and judgment which can be reasonably expected from similarly situated professionals.” City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978).
complete performance to substantial performance, and an exclusive agency contract was held to require a good faith duty of best efforts. Intertwined with the notion of reasonableness are the norms of reliance, fairness, and justice.

Justice Cardozo examined the interplay between the norm of precedent and the dictates of justice in reviewing the doctrine of substantial performance. "I have no doubt that the inspiration of the rule is a mere sentiment of justice." This "sentiment of justice" was the driving force behind the doctrinal development to "protect builders who in trifling details ... have departed from their contracts." Those concerned with the preservation of the generality and formality of legal doctrine were concerned about such ad hoc incursions. Thus, the courts "proceeded to surround [the doctrine of substantial performance] with the halo of conformity to precedent." The same can be said of the encasing of other fairness-based developments within "halos of precedent." The formalization into doctrine of such subjective case by case inquiries as undertaken in connection with satisfaction clauses, the implication of best efforts, and the interpretation of covenants not to compete can be seen as formalism's "intellectual passion for elegentia juris, for symmetry of form and substance." Nonetheless, it is clearly a triumph of the fairness-justice norms over those of certainty and predictability.

Closely associated with the enhanced place of the fairness-justice norms in contract is the use of the reliance norm to extend the reach of contractual liability. Professor Fuller forewarned that protection of the reliance interest may become "the exclusive raison d'etre of judicial intervention." He noted that one of the major concerns of such an expansive exercise of contractual recovery is that it "would unduly broaden the field of legal intervention." The reliance norm's place within contracts would ultimately be determined by "an inquiry into the

532. CARDOZO, supra note 2, at 44 (emphasis added).
533. Id.
534. Id. at 44-45.
535. See supra part III.A.
536. See supra part III.F.
537. See supra part III.E.
538. CARDOZO, supra note 2, at 34.
539. Professor Atiyah notes that by 1954 "classical theory was already giving way to a different approach, which laid less stress on promissory liability, and more on paternalistic devices." ATIYAH, supra note 18, at 173.
541. Id. at 420.
reasons which underlie . . . the enforcement of promises generally." 542
The notion of "bargained for exchange," in traditional contract doctrine, limited the basis for judicial intervention upon the rationales of convenience and certainty of contract.43 The injustice of uncompensated reliance upon another's promise soon became a formidable counterweight. It was to the rectification of such injustice that Fuller likely directed the bold statement that "the fundamental purpose of the law is the prevention of unjust enrichment."544

Professor Summers notes that "authority reasons," such as adherence to precedent, need not be inconsistent with the other norms of contract law. It is only in the formalistic application of precedent and rules that a judge loses her normative grounding. "[P]recedents are not self-defining and self-applying. To apply a precedent rationally, judges must advert to the substantive reasons behind it."545 It is to these underlying reasons or norms to which we now turn for a fuller exposition. It will then be determined whether one may venture some insights on how the norms interrelate in the course of judicial decision-making.

A. The Norms of Traditional Contract Doctrine

1. Certainty and Evidentiary Norms

The systemic rationale of traditional contract doctrine held that certainty of contract provided for the efficiency which the free market system mandated. The formal application of the classical checklist of contractual formalities allowed for parties to transact business in an open, fair, and efficient manner. A party to a business transaction was assured that if the proper formalities were followed she would have predetermined the legal outcome of a subsequent dispute. For example, one would be able to limit one's legal exposure by not conforming to the known requirements for contractual liability. Alternatively, one could obtain contractual rights by following the required formalities. By choosing an accepted legal device, one may channel a transaction into the protective area of contract. Also, the selection of a formalized model of

542. Fuller & Perdue, supra note 6, at 53. The normative nature of this inquiry is evident: "In actuality the loss which the plaintiff suffers . . . is not a datum of nature but the reflection of a normative order." Id.
543. "[T]he law of contract was designed to provide for the enforcement of the private arrangements . . . In general the law was not concerned either with the fairness or justice of the outcome . . . ." ATIYAH, supra note 18, at 9.
544. Fuller & Perdue, supra note 6, at 67.
545. Summers, supra note 263, at 783 (footnote omitted).
contract enables a party to reach the evidentiary threshold needed to pursue and win a breach of contract cause of action. This enhanced predictability allows for ease of judicial administration and efficient contracting. Professor Dworkin refers to this conception of law as "conventionalism." The reason for judicial intervention "is exhausted by the predictability and procedural fairness" that such intervention supplies.546

Karl Llewellyn believed that the notions of certainty and predictability in the law are based upon a false conception of precedent. He explained that "The basic false conception is that a precedent or the precedents will in fact (and in 'a precedent-system' ought to) simply dictate the decision in the current case . . ."547 It is a fallacy premised upon the ideology that doctrine will provide the one single right answer.548 The belief is that the law of contracts provides a set of categorical imperatives in which all rational judges glean the same decision from the body of preceding cases. The realist believes that, except for cases of precise precedential application, certainty of outcome is a tenuous hope. Llewellyn sees the judicial decision-making process as merely involving the "lessening [of the] uncertainty of outcome."549

2. Predictability Norm

Predictability may be viewed as a lesser degree of certainty. It is a belief that contract rules and doctrine do allow business parties and their lawyers to predict the likely outcome of a contractual dispute. According to Holmes's theory, "valid law consists of a rule or other precept that in the generality of cases is likely to prevail."550 The most notable dissertation of this idea is Justice Holmes's "prediction theory" of the law.551 "The best that [a judge] usually can do is make a more or less informed . . . prediction of how the matter in issue will be resolved through the judicial process."552 In The Problems of Jurisprudence,
Judge Posner resurrects the prediction theory as an able enough answer to the question of "what is law?" For Posner, law is an activity subject to examination. "The law is not a thing [that judges] discover; it is the name of their activity. They do not act in accordance with something called 'law'—they just act as best they can." The absolute nature of the certainty norm envisions that there is only one right answer to an issue in dispute. In comparison, the prediction theory holds that a judge has a choice among a number of reasonable alternatives. "[T]he judge's proper aim in difficult cases is a reasonable result rather than a demonstrably right one . . . ."

3. Contract as Promise or Moral Convention

Professor Fried has strenuously made the case for the morality of enforcing contracts. In short, one has a moral obligation to keep one's promise when using the "convention" of promising:

There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.

This is the deontological argument for the enforcement of contracts. Contracts should be enforced because everyone has a duty to fulfill one's promises. The influence of the "morality of promise" can be seen at work in Cardozo's famous opinion in Allegheny College. During the period of this decision, circa 1927, charitable gifts were generally viewed generally Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 793 (1989) (arguing that the apparent contradiction between Holmes's theoretical approach to the law and his view that the law is a tool for pragmatic prediction "are consistent with his pragmatist account of law as experience"); Note, Holmes, Peirce, and Legal Pragmatism, 84 YALE L.J. 1123 (1975).

553. POSNER, supra note 29, at 220-44. Judge Posner incorporates the prediction theory into a "broader activity theory of law." Id. at 225.

554. Id. (emphasis added) (footnote omitted). In our multi-layered court system, it is thus a function of a lower-court judge to predict how an appellate court would decide an issue on appeal. "The prediction theory, when viewed normatively, implies that the function of the lower-court judge is to predict how the higher court would decide his case." Id. at 227.

555. Id. at 26. This view of the law is clearly consequentialist in nature. See id. at 26, 223.

556. FRIED, supra note 20, at 17. But see Wallace K. Lightsey, A Critique of the Promise Model of Contract, 26 WM. & MARY L. REV. 45 (1984) (arguing that the exchange-relationship model is better for society than Fried's promise model of contracts, which involves a provincial and antagonistic relationship between the individual and the community, because the individual and the community support and complement each other).

as unenforceable due to a lack of consideration. Justice Cardozo superficially satisfies the requirement of consideration by finding that the promise to "permit the name" of the intended donor was adequate consideration. A better explanation for the decision is that the "supplementary gloss," referred to by Cardozo, would have made it "immoral" for the promisor not to fulfill her promise.

4. Efficiency, Autonomy, and Free Will Norms

Before its more recent appearance in law and economics literature, efficiency and economics had long been recognized as the basis for contract enforcement. In his 1933 article, The Basis of Contract, Professor Cohen explained the "economic argument for contractualism." The economic basis is premised upon the belief that "a regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a nation." This regime's focus is upon the enforcement of contract for the purpose of the efficient use of resources or the maximization of wealth. Implicit in this approach is a non-moral, or at least a "rational," view of breach. If the benefits of a breach outweigh the costs, then breaching one's contract is an appropriate course of action. "If a party finds that another deal can provide more benefit even if damages are paid, then that party is free to break the contract."

A number of reasons provide the basis for the norms of efficiency and free will. Contracts should be enforced because they "foster[] individual autonomy, promot[e] fair allocation of social benefits, and minimiz[e] the costs of transacting." The efficiency and autonomy norms often argue for strict enforcement of contract and a minimal amount of judicial intervention. However, one commentator notes that in the case of a contractual ambiguity, or "gap," the most efficient term may not be one intended in the parties' "hypothetical bargain." Therefore, for the efficiency norm to be advanced, the court should interpret

558. See id. at 176. Although disagreeing with the opinion of the court, Justice Frank noted, "I can see no ground for the suggestion that the ancient rule which makes consideration necessary . . . is in danger of effacement . . . . To me that is a cause for gratulation rather than regret." Id. at 178 (Frank, J., dissenting).
559. Id. at 174.
561. Id. at 562-63.
the contract “in a way that the court believes to be socially desirable.”564

B. “New Spirit” of Contract Norms: Good Faith and Fair Dealing

The “new spirit” of contract implies a duty of cooperation, good faith, fair dealing, and, conceivably, a duty to modify or adjust. It has most often been applied to long-term, relational contracts. However, the potential breadth of this “new spirit” is unlimited in scope. The notions of good faith and fair dealing have been incorporated into the Uniform Commercial Code565 and the Second Restatement.566 The most “liberal” version of this “new spirit” implies a duty to modify or adjust the terms of a contract in order to preserve the longevity of the contractual relationship. This entails the use of norms not generally associated with contracts. Professor Macneil identifies two such norms:

[There are] two norms particularly applicable to contractual relations: (1) harmonizing conflict within the internal matrix of the relation, including . . . discrete and presented behavior with nondiscrete and nonpresented behavior; and (2) preservation of the relation. These norms affect change in contractual relations . . . .

. . . . [This is especially true] with situations where the desire is to continue the relation, not to terminate it.567

The norms of the new spirit provide the normative and doctrinal flexibility needed to adjust and preserve long-term, relational contracts. This notion of a duty to adjust has profound implications on the remedial end of the spectrum. In the event a party “strictly” enforces the terms of a relational contract, she may be surprised to find the contract retroactively reformed by a court. These “new” norms place a party on notice

564. Id. at 1878.
566. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). See generally Summers, supra note 207, at 835 (noting that with the adoption of Restatement (Second) of Contracts § 205, there will be an increase and “growth of general contract law on good faith”).
that refusing a reasonable request for a modification may not be done without some peril.

C. The Reliance Norm

The dialectic between the traditional contract norms and the reliance norm has been "codified" in sections 75 and 90 of the Restatement (Second) of Contracts. The formality "of the bargain" in traditional contract law serves the channeling, cautionary, and evidentiary functions that it was designed to safeguard. However, the limiting of contractual remedies by the requirements of formality often resulted in uncompensated harm. The need for greater flexibility in providing relief for injury caused by "informal" promise was soon recognized. Fuller and Corbin persuasively made their case for the recognition of the reliance interest in order to provide a remedy for such promissory injury. Professor Boyle described Fuller's "acceptance" of the shortcomings of the "formalistic criteria [required] for enforceability" of contract:

Where the classicists stressed form . . . as theoretical a prioris, Fuller subjected those ideas to functional scrutiny, decried the undervaluation of the reliance principle, and found reasons for enforceability in relative and contingent community norms. Fuller accepts that Section 90 . . . may require the judge to step in post hoc and create enforceable bargains where necessary . . . ; he portrays the formal requirements of contract as being in dialectical, productive tension with their functional goals . . . .

Reliance or promissory estoppel became the "equitable" means to redress such injury. In Jacob & Youngs, Inc. v. Kent, Justice Cardozo eloquently restated the tension between the consistency of rules and the "wavering and blurred" lines that equitable considerations often produce. Justice Cardozo stated, "Something, doubtless, may be said on the score of consistency and certainty in favor of . . . stricter standard[s]. The courts have balanced such considerations against those of equity and

568. RESTATEMENT (SECOND) OF CONTRACTS §§ 72 cmt. c, 75 cmt. a (1979).
569. The Second Restatement indicates a reliance antecedent in the days of common law writ. "It is fairly arguable that the enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise." Id. § 90 cmt. a (emphasis added).
570. Boyle, supra note 19, at 372.
571. Id. (footnote omitted).
572. 129 N.E. 889 (N.Y. 1921).
573. Id. at 891.
fairness, and found the latter to be the weightier.”

D. The Norms of Equity: Fairness and Justice

The use of equitable doctrines has been a formal part of contract law since the merger of law and equity. Cardozo states that equitable doctrines “are merely the remedial devices by which a result conceived of as right and just is made to square . . . with the symmetry of the legal system.” 4

The doctrine of substantial performance and the objectification of satisfaction clauses are examples of where the courts have imposed doctrinal changes in order to meet the demands of society’s sense of fairness. 5 Such doctrinal changes are vastly outnumbered by the use of fictional devices in an attempt by the courts to mask the “equitable reformation” of contracts. This covert operation is due to the courts’ attempt to serve two masters at the same time. In both instances, the courts are fearful of the consequences of their decisions. This teleological duality creates inherent normative tension in the rendering of the decision. It is the pitting of the norms of classical contract against the norms of substantive fairness long found in equity. It is the concern for the substantive consequences to the immediate parties, on one hand, and the fear of such a decision upon the security of future transactions. Professor Sherwin explains the dilemma as follows:

[T]hree of the values that influence contract law point toward the legal model of enforcement: the social utility of a market economy, efficient resource allocation, and respect for personal autonomy. . . . [It is] a preference for the formal medium of rules [which] preempt[s] further normative evaluation. . . . [T]he equitable model of enforcement . . . grants relief from contract obligations on the basis of unfairness in the process and substantive content of a bargain, exercis[ing] compassion at the expense of utility and stability. . . . 6

Professor Atiyah has stressed the importance of “fair exchange” in the

574. Id.

575. See CARDOZO, supra note 2, at 42-43.

576. “It is the function of our courts to keep the doctrines up to date with the mores [of the community] by continual restatement . . . .” A.L.C., The Offer of an Act for a Promise, 29 YALE L.J. 767, 771 (1920), quoted in CARDOZO, supra note 2, at 135.

577. Sherwin, supra note 506, at 272, 276. The different goals or perspectives of fairness and classical contract are explained as follows: “[Fairness’s] object is not to regulate future conduct in a range of similar cases, but to undo an unjust result between parties.” Id. at 275.
judicial mind. "[M]any of the norms and ideas which permeate contract law will often be utilized—for instance, [a judicial decision] may be influenced by ideas of ‘fair exchange.’" One commentator analyzed the use of "fairness norms" as they pertain to the issue of the cessation of contractual relations. It is clear that "fairness norms . . . supplement freedom of contract." Courts often weigh the fairness consequences when deciding the issue of cessation. Fairness and justice concerns pervade the entire spectrum of contract, from formation to cessation.

V. "INTO THE CALDRON: ALL OF THESE INGREDIENTS ENTER IN VARYING PROPORTIONS"

Contract research has unduly centered upon the legitimation of the law through a unified perspective. The history of contract has evidenced a cyclical approach of search and destroy. Analysis after analysis has been forwarded to extract excalibur from its lodging within the edifice of contract. Each attempt at exerting the "one" true unified bond that holds all of contract together has failed to receive universal acceptance. Each of these attempts, from Blackstone to Fried, has received its fair share of criticism. Unfortunately, the framing of the research goal as the discovery of some mystical unifying web into which all that is contract can be weaved has doomed many an effort to the jurisprudential dust bin. The harmful effects have been the underutilization of valuable research simply because of its failure to "reach that unreachable" goal. Instead, we should recognize that most of the major schools of thought offer essentially correct information that can provide guidance to both practitioner and scholar.

Most of the old and new theories of contract have served to enrich and expand our jurisprudence. Professor Hillman asserts that "contract law is a complex set of rules and principles." As such, the theoretical

578. ATIYAH, supra note 18, at 4 (emphasis added).
579. Hillman, supra note 441, at 620. "[C]ourts typically weigh potential gains and losses from cessation and evaluate the reasonableness of the parties' conduct to ensure a fair result." Id. at 658.
580. CARDOZO, supra note 2, at 10.
581. Professor Bayles recognizes this focus of most contract theories. He states, "Most theories of contract law adopt a single aim: the enforcement of agreements or promises, maximizing economic value, or fulfilling reasonable expectations. An advantage of this approach is that it provides a unity to the field." Bayles, supra note 562, at 319.
underpinnings, by necessity, must reflect that complexity. One may argue that the complexity of contract law has grown over the years. The sophistication and complexity of modern commercial transactions have tested the rudiments of classical contract law. The long-term and increasingly relational nature of modern transactions have induced the modification of doctrine and the institutionalization of new conceptions of contract law. The diversity of norms, that have been served by the different theories, should all be looked upon in providing an adequate conceptual framework. The recognition and acceptance of a normative composite that incorporates the different norms and theories is in order. Instead of the exclusivity fostered by "contract as promise," the "efficient breach of contract," and "death of contract" theories, a recognition of the diversity of contract and the inability to quantify a unified theory would be more productive.

A. Departmentalization: A Beneficial Side Effect of a Non-Unified Approach

The use of fictional devices to place different contracts within the pigeonholes of existing doctrine should be discarded. An acceptance of the "diversity of contract" allows for the utilization of a wide range of existing descriptive and normative theories. An approach that

contract law is also tempered both within and without its formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements." Id. at 104 (footnote omitted).

584. The increased prominence of promissory estoppel and § 90 of the Restatement is but one example. For the long-term nature of many of today's contractual relations, see generally Gillette, supra note 441; Hillman, supra note 440; Macneil, supra note 169. The increasingly relational nature of today's transactions is reflected by the fact that over 50% of our gross national product is attributable to the service sector. See infra note 594.

585. See FRIED, supra note 20, at 8.

586. For discussion of law and economics theorists, see supra part II.D.

587. See GILMORE, supra note 5.

588. "A highly abstract core theory simply cannot exercise dominion over the entire field of contract." Hillman, supra note 583, at 123.

589. Courts have often utilized fictional or "doctrine stretching" devices to overcome the harshness of classical contracts' "all-or-nothing" approach. See Robert W. Reeder III, Court-Imposed Modifications: Supplemeting the All-or-Nothing Approach to Discharge Cases, 44 OHIO ST. L.J. 1079 (1983). Reeder notes, "[C]ourts have developed an array of doctrines .... [T]hese doctrines assist courts in defining a shifting line of compromise between the impulse to uphold the sanctity of business agreements and the desire to avoid imposing obligations that are ... unduly burdensome." Id. at 1080 (quoting Fuller & Perdue, supra note 94, at 379).

590. Karl Llewellyn recognized this diversity: "[I]n our legal system we have large numbers of mutually inconsistent major premises available for choice: 'competing' rules, 'competing' principles, 'competing' analogies ...." LLEWELLYN, supra note 19, at 12.

http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss2/8
recognizes the "diversity of contract" will allow a fuller use of existing norms and theories. Contract law should be departmentalized into classes of contract.\textsuperscript{591} The most applicable theories, and their normative foundations, could then be applied in varying degrees to the "types" of contracts that they can best serve. One attempt at categorization of contract was promoted by Karl Llewellyn. His unadopted version of the Uniform Commercial Code would have provided separate rules for merchants and nonmerchants. One commentator noted, "[Llewellyn] advocated that the [sales] law conform to a normative vision of merchant reality . . . .\textsuperscript{592} It may be argued that contract law has always involved the categorization of contracts. Two prominent scholars noted that contractual intent only results in liability "where that intention runs in terms which coincide roughly with the categories of the law."\textsuperscript{593} The remainder of this Article will analyze two interrelated propositions. First, the need for a recognition of "categories" of contract. Second, the acknowledgement that there is no unified theory of contract, but only a variety of non-unified theories that may all be useful in varying degrees when applied to the different categories of contract. A brief analysis of recent categorizations in the law of contracts may help illustrate how a non-unified approach may better reflect contractual reality.

1. Transactional/Relational Dichotomy

An example of categorization is the bifurcation between transactional and relational contracts. Approximately fifty-three percent of our Gross National Product involves the sales of services.\textsuperscript{594} A number of commentators have argued that the courts need to focus upon the "contextual realities"\textsuperscript{595} of relational contracts beyond that which is dictated by

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\textsuperscript{591} This has long been the case at a more general level. "[M]ost contracts fall into certain well-recognized classes, such as a sale of goods, hire-purchase, agency, employment, partnership, [and] insurance . . . . Each of these contracts has its own 'law' just as much as the general law of contract . . . ."\textsuperscript{ATIYAH, supra note 18, at 214 (emphasis added).}

\textsuperscript{592} Wiseman, supra note 369, at 493. Llewellyn believed that the existing unitary set of rules for all of sales law was "removed from the actual facts of commercial transactions." Id. at 492.


\textsuperscript{594} BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, at 430 (1992) (compiling Gross National Product information from the years 1970 to 1991). The sales of services has been an expanding segment of our economy. The 53% registered in 1991 compares to 40% attributable to the sales of services in 1970. Id.

\textsuperscript{595} Hillman, supra note 583, at 126; cf John Kidwell, A Caveat, 1985 Wis. L. Rev. 615 (noting that "contract-as-transaction" is still predominant, in the law of contract, over.
discrete, transactional exchanges. Professor Hillman acknowledges the different normative mind-sets which these two areas of contract demand: "[R]elational norms such as cooperation and compromise, rather than promises, largely govern these parties' associations."\(^{596}\) It has been argued that the "relational realities" are such that the parties have implicitly agreed to a duty to adjust in order to save the relationship.\(^{597}\) The complexity of relational transactions and the "anticipation of cooperation" implied in such relations was recognized by Professor Macneil. He noted that the "[p]ossibility of trouble [is] anticipated as [a] normal part of relation[al contracts], to be dealt with by cooperation and other restorational techniques."\(^{598}\) One may argue that there is a greater "duty to adjust" in a relational contract than in a discrete, transactional one.\(^{599}\)

2. Discrete/Long-Term Relationships

The duty to cooperate and to adjust contractual terms is also more likely to be emphasized in long-term relationships. The force of fairness and relational norms are likely to exert greater force in such contracts. In contrast, the certainty norm is likely to exert greater force in more discrete, transactional-types of contracts. One commentator has suggested the use of the term "interaction" as being preferable to the term "transaction": "‘Transaction’ suggests a discrete event, whereas ‘interaction’ can apply to a long-term relationship."\(^{600}\) The significance of this change in terminology is that "[m]uch traditional contract law focuses on brief interactions between strangers. Yet, in the contemporary world, many contracts, such as employment, franchise, and installment contracts, pertain to a course of dealing between parties."\(^{601}\) The Second Restatement accepts the reality of "on-going transactions"\(^{602}\) by

\(^{596}\) Hillman, supra note 583, at 124.

\(^{597}\) See Hillman, supra note 440, at 3.

\(^{598}\) Macneil, supra note 169, at 740; see also Gidon Gottlieb, Relationalism: Legal Theory for a Relational Society, 50 U. Chi. L. Rev. 567 (1983). Gottlieb states, "The dominant aspect of juridical activities in relational societies is not of a litigious character. It centers instead on the practices of actors and on their usages, customs, and interpretations that mediate between actors' actual patterns of conduct and the formal juridical instruments that are deemed to govern them." Id. at 568.

\(^{599}\) For a contrary opinion, see Gillette, supra note 441.

\(^{600}\) Bayles, supra note 562, at 318.

\(^{601}\) Id. (emphasis added). See generally MACNEIL, supra note 22.

\(^{602}\) Restatement (Second) of Contracts § 89 cmt. a (1979).
recognizing an exception to the pre-existing duty rule. 603 Section 89 provides for modifications of executory contracts “if the modification is fair and equitable in view of circumstances not anticipated by the parties.” 604 Its scope becomes more expansive by making modifications not binding when made but subsequently binding if there had been reliance on the promised modification. 605

Professor Lightsey formulates an “exchange-relationship model” of contract based upon long-term contracts. Instead of focusing upon the will of the parties or the promise itself, this model treats contract as a “socio-legal relationship.” 606 Its focus is upon external contractual norms in determining the scope of the contractual obligation. The norms stressed by this model are societal in nature. They include “general societal norms of fairness and reciprocity, ... and trade custom.” 607 This model recognizes the obvious differences between long-term contractual relationships and short-term relational contracts or one-shot transactional agreements.

3. “Equality” of Bargaining and Contracts of Adhesion

Contracts of adhesion have been treated differently by many courts. The idea of mutual assent is clearly an illusion in most contracts involving the use of a form provided by one of the parties. Nonetheless, the courts have routinely upheld their validity. The difference in treatment as compared to classical “bargained for” contracts can be seen in how the courts have reviewed the clauses and terms within the forms. The courts have undertaken full-scale fairness inquiries in limiting the enforceability of “unfair terms.” The Second Restatement adopts the relative bargaining power of the parties as a factor in determining the substantive fairness of a contract term. 608 The interplay of a one-sided contract term and inequality of bargaining power has been a key in the

603. See generally Burton F. Brody, Performance of a Pre-Existing Contractual Duty as Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation, 52 DEANER L.J. 433, 434-35 (1975) (examining the role of the pre-existing duty rule in light of, and in conflict with, long term modern-day contracts where “there is a greater need for, and frequency of, modification of original contracts”).

604. Restatement (Second) of Contracts § 89(a) (1979). Note that despite its title, § 89 applies to more than just “wholly” executory contracts. It allows for modification of “contract[s] not fully performed on either side.” Id. § 89 (emphasis added).

605. See id. § 89(c).

606. Lightsey, supra note 556, at 67.

607. Id.

608. See Restatement (Second) of Contracts § 208 (1979). See generally Leff, supra note 206.
finding of unconscionability. The use of a standard form provided by the "stronger party" has resulted in a heightened level of scrutiny of its terms by the courts.\footnote{609}{Courts dealing with form contracts or unconscionable contracts have been increasingly willing to disregard terms of the contract found to be against public policy or otherwise contrary to societal understandings of fairness." Lightsey, supra note 556, at 47.} This reformation of unconscionable terms as an affront to the freedom of contract norm was noted by a commentator on Australian law: "Laissez-faire has had to yield to pressures for protection of the individual against another more powerful contracting party."\footnote{610}{VERMEESCH & LINDGREN, supra note 17, at 623.} The Second Restatement makes it clear that contracts of adhesion are to be viewed differently from other forms of contract. "[T]he more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability."\footnote{611}{RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1979) (reporter's note). For an international perspective, see Andrew Burgess, Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion, 15 ANGLO-AM. L. REV. 255, 274 (1986) ("The correct standard by which to judge the fairness or unfairness of these contracts must be the public interest.").}

4. Custom Drafted Contracts and Standard Form Contracts

Often associated with the term "contracts of adhesion" is the use of standard form contracts. However, the term "adhesion contract" is often viewed in a negative way. It is the illegitimate child of the more general, "legitimate" use of form contracts. Form contracts have been recognized as a necessary evil needed to facilitate the demands of a consumer society.\footnote{612}{See generally Slawson, supra note 435. Slawson states that "under the conditions of modern contracting buyers are usually not reasonably expected even to read the forms before they become bound." Id. at 26. Section 211 of the Restatement also recognizes the "utility of standardization": "Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1979).} Unreasonable terms that reflect an inequality of bargaining power have generally been stricken by the courts as being "unconscionable." More generally, the fact that a contract is a product of "dickering" or is a standard form is likely to play a role in a court's enforcement decision. A custom contract may evoke a strong presumption in favor of the enforcement of a term in dispute. A non-dickered term in a standard form contract lacks the "necessary" assent of the parties resulting in a weakening of the presumption of enforceability.\footnote{613}{Karl Llewellyn was the first to recognize the problem of "lack of assent" in standard form contracts. See Slawson, supra note 435, at 32-37.} Thus, a differentia-
tion between “customized contracts” and standard form contracts may provide guidance on how a court approaches a case.

B. Contract Law as a Normative Composite

Professor Hillman, in The Crisis in Modern Contract Theory, argues that the “debate” between freedom of contract and legislative-judicial preemption of the contracting process has distorted much of contract theory.\(^\text{614}\) His observations are equally applicable to the illusion of a unified theory:

This debate contributes to the crisis in contract theory, because it diverts our focus from the reality that freedom of contract and fairness principles are all very important. . . . In short, conflicting and complex theories, principles, rules, and policies dominate modern contract law and together govern the relations of people in our society.

. . . . We would have to concede the bankruptcy of attempts to concoct a unified theory of the whole.\(^\text{615}\)

The problem with unified theories and the rigid application of contract rules based upon such theories is that they are exclusionary. For example, “pure” bargained for exchange would preclude reliance liability upon an unreciprocated promise. The notion of “efficient breach” would justify nonperformance, whereby the morality implicit in “contract as promise” would not condone such a breach. Classical contracts’ focus on the importance of the generality of law would preclude the implication of a “duty to adjust” by the “new spirit” of contract.

The diversity of norms and theories of contract should all be allowed to provide “information” for the decision-maker. “A rational person uses logical reasoning and all relevant available information in . . . deciding what to do, and [in] accepting legal principles.”\(^\text{616}\) So too, we should encourage our judges to use their logical reasoning to utilize and decipher all of the information available in making their decisions. A normative composite formulated with all relevant contractual theories should be used by the courts in weighing the consequences of a given decision.

These norms can be found in the existing rules of law. Contract rules were initially formulated to forward certain goals or norms. By

\(^{614}\) See Hillman, supra note 583, at 133.

\(^{615}\) Id.

\(^{616}\) Bayles, supra note 562, at 313.
returning to the genesis of the different rules of contract, we can rediscover their normative origins. The courts should attempt to "synthesize" as many of these norms and goals in reaching their decisions. Professor Summers, in noting that the norms may be in conflict and that it is the task of the court to structure a decision that best minimizes the conflict, states, "[T]here usually will be no simple, single goal for a legal precept. The goals of a given precept form a goal 'constellation' or 'synthesis' that usually reflects some effort to accommodate conflicts in an optimal way." What is being suggested may be no more than what Llewellyn referred to as the need to return to the "Grand Style" of decision-making or to Cardozo's notion of "balancing" the conflicting demands of the norms of contract. Cardozo explains that "[t]he social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness."

A non-unified approach to the enforceability and interpretation of contract would be premised upon two exercises. First, there would be an analysis of the norms underlying the doctrines and theories of contract. Second, there would be the recognition that the norms represented by classical contract theory and those that are behind the "new spirit" of contract do, and should, coexist. The diversity of this normative base should be recognized and used by courts in dealing with the "diversity of contract." This diversity of contract precludes the notion of a "hierarchy" of norms. In a given type of contract, the norm of certainty may be the predominate influence. In another, the norms of fairness or justice may tip the balance in another direction. The fact is that this interplay of the norms of contract has always been at the heart of judicial decision-making. What is posed here is a fuller recognition of the

617. Summers, supra note 20, at 885 (emphasis added).
618. LLEWELLYN, supra note 19, at 36. The Grand Style refers to a manner of decision-making—"a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need." Id. at 37.
619. CARDOZO, supra note 2, at 113. Cardozo believes that the "judicial methods" available to judges in balancing these "social interests" are sufficient for the task. He notes, "[T]he whole subject matter of jurisprudence is more plastic, more malleable... than most of us... have been accustomed to believe." Id. at 161.
diversity of contract and of contractual norms that the notion of a unified theory has precluded.

VI. CONCLUSION

Behind the facade of the notion of a unified theory of contract, many of the inner rumblings of the normative foundations of contracts have gone unnoticed. In fact, the normative ground-swell that laid the basis for many of the doctrines and rules of contract has been prevented from further nourishing our jurisprudence. One may argue that there has been an ongoing process of detachment between norm and rule. Oftentimes, the normative basis of certain rules of contract have been ignored in the promotion of a unified theory. A review of the different unified theories and the search for the norms of contract leaves one humbled by the complexity of the contractual landscape. Roscoe Pound may have had this in mind when he proclaimed that “[n]owhere . . . has the deductive method broken down so completely as in the attempt to deduce principles upon which contracts are to be enforced.”

An analysis of the law of satisfaction illustrates the battle between the norms of certainty and freedom of contract with the fairness norm. Like the shifting of two geometric plates, the fairness of the exchange has further encroached upon the domain of freedom of contract. The classical preference for the determinacy of contract has given way to the flexibility available by the fairness inquiry. The result is that subjective satisfaction is redefined through the eyes of objectivity. Instead of preserving the rule of freedom of contract, the courts should simply make clear that unreasonable satisfaction clauses will not survive the strict scrutiny of the fairness norm. The courts should return to the jural rudiments and normative base of contract. The full panoply of norms provided in our jurisprudence should be openly applied. Rule fixation should give way to the use of a normative composite. The job of judge and scholar should be to base decisions on and find solutions which best balance the competing norms.

A recognition of the “diversity of contracts” and of the norms of contracts will allow the law to achieve the benefits of both backward-looking and forward-looking mind-sets. Moreover, it would allow the use of both deontological and teleological philosophy in order to structure a system that promotes justice, certainty, and efficien-

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620. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 149 (rev. ed. 1954).
621. See POSNER, supra note 29, at 223-27.
Judge Posner defines wise adjudication as "finding the right balance between predictability and flexibility." The advantage of the flexibility of a normative composite approach to decision-making is its adaptability to contractual situations that continue to grow in variety and complexity. Judges should no longer feel unduly constrained by the dictates of contractual dogma. The decisions of the past should be a source of guidance, not the source of preordination.

622. *Id.* at 147.