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Cover Page Footnote

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THE LAST PROMISSORY ESTOPPEL ARTICLE*

*JAY M. FEINMAN***

In this essay, Professor Feinman argues that the doctrine of promissory estoppel has outlived its usefulness as a theory of contract. Professor Feinman relies on an article written by Professors Edward Yorio and Steven Thel as an illustration of the debate over whether promissory estoppel is based upon the enforcement of promises or the protection of reliance. Professor Feinman rejects the conceptual framework upon which this debate is based and ultimately proposes that contract law should move to a relational analysis, ignoring the distinction between promise and reliance and replacing it with an analysis of the obligations involved in a particular relationship.

INTRODUCTION

THE doctrine of promissory estoppel,[1] currently embodied in section 90 of the *Restatement (Second) of Contracts*,[2] has been the focus of some of the most important and interesting debates in contract law in this century. Many scholars have added to our understanding of the subject (as well as adding lustre to their scholarly reputations) by writing about the doctrine.[3] Lon Fuller was the first, writing one of the greatest of all law review articles, *The* Reliance Interest *in Contract Damages*.[4] Some fifty-five volumes of the *Yale Law Journal* later, in the last article published before his death, Edward Yorio and his colleague Steve Thel have brought us full circle in a careful article that challenges some of the

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1. The doctrine under discussion is variously referred to in the literature as promissory estoppel, section 90, and reliance. None of those terms captures the doctrine completely accurately, so I use them interchangeably.

2. Restatement (Second) of Contracts § 90 (1981).

3. *See infra* text accompanying notes 40-50. For my contributions, see Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv. L. Rev. 678 (1984) [hereinafter *Promissory Estoppel*]; Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 Wis. L. Rev. 1373.

4. *See* Lon L. Fuller & William R. Perdue, Jr., *The* Reliance Interest *in Contract Damages* (pts. 1 & 2), 46 Yale L.J. 52, 373 (1936-1937). On Perdue's contribution to the article, see *Promissory Estoppel*, *supra* note 3, at 684 n.27. For recent reflections on the significance of the article, see Stewart Macaulay, *The* Reliance Interest *and the World Outside the Law Schools' Doors*, 1991 Wis. L. Rev. 247; Todd D. Rakoff, *Fuller and Perdue's The Reliance Interest as a Work of Legal Scholarship*, 1991 Wis. L. Rev. 203; Fred R. Shapiro, *The Most-Cited Articles from* The Yale Law Journal, 100 Yale L.J. 1449 (1991).

received wisdom about section 90 that developed from Fuller's work.[5]

In this essay, I argue that promissory estoppel is no longer an appropriate doctrine, given recent developments in the wider scheme of contract law and theory, and thus it is time to move on. Indeed, we ought to abandon not only promissory estoppel but also the framework of contract thinking that has given it vitality. I briefly describe the original objective of promissory estoppel and how the doctrine served that objective, and I then explain why Yorio and Thel's analysis, although persuasive on its own terms, simply misses the point of where contract theory is and where it ought to go with respect to promissory estoppel and other doctrines.[6] Yorio and Thel attempt to answer the empirical question of whether section 90 doctrine is essentially directed to the enforcement of promises or to the protection of reliance. I criticize the conceptual framework that makes it possible to ask that question. Thus, it may seem that my argument is subject to the familiar complaint that I am criticizing the article that they did not write. However, there is a legitimate issue as to whether scholars ought to use the conceptual framework that underlies Yorio and Thel's question so that the empirical question framed is an interesting and important one, or whether scholars should use some other approach to describe and then evaluate the phenomenon under examination.

I. THE OBJECTIVE OF PROMISSORY ESTOPPEL AND ITS ROLE TODAY

The original objective of promissory estoppel was to provide a substitute for consideration in certain cases involving promises that were not bargained for.[7] Defining this as the doctrine's "objective," of course, does not mean that judges and scholars consciously designed it to fill a perceived gap in the case law. Instead, the doctrine evolved through the common law process as a device that helped avoid results that were perceived to be unjust in particular kinds of cases.[8] These cases mostly involved gratuitous, noncommercial promises: charitable subscriptions, gift promises between relatives, and marriage settlements.[9]

The accumulation of cases like these forced the drafters of the *Restatement of Contracts* to include section 90 on reliance as an alternative to section 75 on bargain consideration. In the view of Yorio and Thel,

5. *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111 (1991).

6. Thus, this essay is not a direct response to Yorio and Thel. I will leave the job of evaluating the details of their argument to scholars who prefer to remain in the neoclassical mode.

7. *See* John D. Calamari & Joseph M. Perillo, Contracts § 6-1 (3d ed. 1987); *Promissory Estoppel*, *supra* note 3, at 679-80.

8. On the idea of law as a practice, see Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 Va. L. Rev. 937 (1990).

9. *See* Calamari & Perillo, *supra* note 7, § 6-2; *Promissory Estoppel*, *supra* note 3, at 680.

although reliance was the "binding thread of principle" in the cases on which section 90 was based,[10] protecting the promisee's unbargained-for reliance was not the ultimate objective of the section.[11] The key element of the doctrine for Samuel Williston, the *Restatement*'s Reporter, was the promise, not the reliance.[12] Reliance was only one of the factors that indicated that the promise was of sufficient quality so that it ought to be enforced.[13] The other elements in section 90 (whether the reliance was foreseeable, whether it was of a definite and substantial character, and whether it actually was induced by the promise) would determine the appropriate scope of the doctrine.[14]

Perhaps if Williston's thinking on consideration had been more advanced, the entire *Restatement* could have been reorganized to clarify his conception of the promissory core of section 90. In the *Restatement*, section 90 is included in an odd chapter entitled "Informal Contracts Without Assent Or Consideration."[15] This was appropriate, even necessary, because the drafters conceived of consideration as a doctrine relating exclusively to bargain, as enshrined in section 75.[16] Since then, consideration has come to be regarded less as a doctrine that recognizes bargain and more as a device that provides evidence that promises were seriously intended, cautions promisors about the significance of their acts, and channels promises into familiar forms.[17] Foreseeable, substantial reliance which is induced by a promise serves the same functions. If the drafters had thought in this way about the functions served by consideration in promissory enforcement, then section 75 and section 90 could have been brought together under a general heading of, perhaps, "Informal Promises with Factors Justifying Enforcement"—a heading that would emphasize the centrality of promise in both consideration cases and section 90 cases. Instead, counterposing reliance and bargain, as done in the *Restatement*, led to problems.

The focus of contract scholars shifted away from the promissory core of section 90 largely as a result of Fuller and Perdue's analysis of contract interests in their 1936 article. Fuller and Perdue provided a new structure for contract law by identifying the interests to be served in awarding contract damages: restitution, reliance, and expectation.[18] These remedial interests in turn reflected the underlying purposes of con-

10. Yorio & Thel, *supra* note 5, at 118 (quoting Samuel Williston, *Commentaries on Contracts Restatement No. 2*, 4 A.L.I. Proc. 19-20 (1926)).

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. Restatement of Contracts §§ 85-94 (1932).

16. *See id.* § 75, § 75 cmt. b.

17. *See* Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 664-66 (Minn. 1960). As with promissory estoppel, the innovative analysis was Lon Fuller's. *See* Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

18. *See* Fuller & Perdue, *supra* note 4, at 53-57.

tract law.[19] Because of Fuller and Perdue's emphasis on reliance, section 90 increasingly came to be viewed as a doctrine that primarily protected reliance rather than enforced promises. In particular, where Williston saw section 90 as a means to create an enforceable contract—the breach of which should be remedied by the award of expectation damages—scholars following Fuller and Perdue viewed reliance damages as the appropriate remedy to protect the reliance interest. This viewpoint, in general and in particular, has been embodied in the *Restatement (Second)*, which has removed the requirement of "definite and substantial" reliance and provided that the remedy may be limited "as justice requires"—that is, to a reliance measure.[20]

The central thesis of Yorio and Thel's article is that the courts have not followed the scholars in moving from an analysis like Williston's, which focuses on the promise, to an analysis like Fuller's, which focuses on reliance. Based on an extensive survey of classic and recent cases, Yorio and Thel conclude that "[j]udges actually enforce promises rather than protect reliance in section 90 cases,"[21] judges use the doctrine to discriminate between promises that are likely to be serious manifestations of intent and those that are not,[22] and judges apply ordinary contract remedies in enforcing promises under section 90, rather than remedies limited "as justice requires."[23]

If Yorio and Thel are correct about what the courts are doing, then several doctrinal consequences follow. First, determining whether a promise is enforceable under section 90 is very much like determining whether any other promise is enforceable. The presence or absence of reliance and the character of that reliance are factors to be considered but are not in themselves determinative.[24] Second, expectation damages—or specific performance in an appropriate case—are the normal measure of recovery in a section 90 case; damages are restricted to reliance recovery only in cases in which the expectation measure is not available for some special reason.[25]

There are two levels of dispute over the role of section 90. The first level, which is the immediate concern of Yorio and Thel's article, is about the accurate characterization of the state of the law, if we take "the law" to be what the courts typically do.[26] Yorio and Thel believe the courts are essentially enforcing promises.[27] The *Restatement (Second)*—to the extent that it attempts to reflect the current state of the law as well

19. *See Promissory Estoppel*, *supra* note 3, at 684-85; Yorio & Thel, *supra* note 5, at 119-23.

20. *See* Yorio & Thel, *supra* note 5, at 115-16, 127-29.

21. *Id.* at 111.

22. *See id.* at 161-66.

23. *Id.* at 136-37.

24. *See id.* at 152-60.

25. *See id.* at 129-51.

26. This is not an unproblematic assumption, but it will do for present purposes.

27. *See* Yorio & Thel, *supra* note 5, at 111.

as the "better rule"—and the scholars allied with it think that the courts are protecting reliance.[28] The second level of dispute is prescriptive. Because Yorio and Thel explicitly disclaim a prescriptive view of their subject, the advocates for this second level must be Williston and his few heirs, who argue that promissory estoppel ought to focus on promises more than on reliance. The line of thinking from Fuller through the *Restatement (Second)*, on the other hand, advances a reliance-based view of the doctrine.

The Fuller/*Restatement (Second)* positions on the empirical and descriptive questions are obviously connected to each other; the point of the *Reliance Interest* article was to justify as well as explain what the courts were doing, and that link between description and prescription has been carried forward in the modern scholarship and in the *Restatement (Second)*. Similarly, although Yorio and Thel refrain from making the connection, their empirical view that courts are essentially enforcing promises in section 90 cases and Williston's promise-focused prescriptive view that that is what the courts ought to do can be tied together into a neat package.

However, there is an even more important connection to be made here. I suggest that the different descriptive and prescriptive positions are much more alike than they seem. All of these views proceed from the same general understanding of neoclassical contract law. The problem is that that understanding so distorts our analysis and has been so highly contested that it retains little integrity. Therefore, I propose that we ought to employ an alternate frame of analysis for the section 90 problem and for contract generally. That alternative is relational contract theory, and its adoption would lead to the abandonment of promissory estoppel. I focus on the section 90 problem and on Yorio and Thel's article because they are the occasion for this essay, but the analysis applies to the whole of contract law.

Are courts enforcing promises or are they protecting reliance? Which should they do? In legal scholarship, as in every other area of intellectual endeavor, the answers we get depend on the questions we ask. Both of these questions, and the different answers to them, arise out of neoclassical contract law. Neoclassical contract is the product of the attempt to accommodate the classical theory embodied in the original *Restatement* and the criticisms of that theory, from the era of legal realism to the present.[29] Neoclassical law and theory provide the normal science that defines the assumptions of scholars working in the field and the limits of the questions that they ask, and thus determines the range of answers

28. *See id.* at 112.

29. On neoclassical contract law, see Jay M. Feinman, *The Significance of Contract Theory*, 58 U. Cin. L. Rev. 1283, 1285-89 (1990) [hereinafter *Significance of Contract Theory*].

that they may find.[30]

Yorio and Thel's article illustrates well the power of normal science in framing questions and answers. Yorio and Thel claim to offer "a coherent and inclusive explanation of the section 90 cases."[31] The core of their explanation is a statement of fact: "the basis of the section *is* promise."[32] The statement of fact is supported by "evidence" that is "extensive and compelling."[33] In analyzing the evidence, they have attempted to account for "normative bias."[34]

All of this makes sense only within a framework. The framework defines what might constitute a coherent and inclusive explanation, defines the terms in which the factual hypothesis is stated, indicates what counts as evidence in support of the hypothesis, and states what would and would not constitute normative bias. But it does not account for the presuppositions of the framework itself.

The framework that motivates the scholarly debate about promissory estoppel is neoclassical contract law. I have described that framework in detail elsewhere,[35] so here I emphasize only two elements of it. Yorio and Thel repeat the familiar aphorism that "[t]he central question of contract law is: Which promises ought to be enforced?"[36] Two points underlie this view that the promise is the central issue. First, the focus of the inquiry is on a relatively discrete promise, one that can be meaningfully analyzed as a distinct element of its setting. Second, the baseline condition of social and economic life is limited responsibility toward others; legal liability is imposed only for actions which rise above that baseline, such as promises of sufficient quality or, as in torts, negligent actions which cause injury.

The pure form of discrete promise is captured best in the style of *Restatement* hypotheticals: "A promises to sell B a horse . . . ." Because A and B are characters without context, their promise has little content.[37] However, there is still a great deal of this type of discussion in the cases and the literature, despite the modern attempt to understand the context in which promises arise, an attempt which is best embodied in the Uniform Commercial Code's concepts of agreement and good faith.[38] Even

30. On normal science, see Thomas S. Kuhn, The Structure of Scientific Revolutions 10 (2d ed. 1970).

31. Yorio & Thel, *supra* note 5, at 114.

32. *Id.* at 114-15.

33. *Id.* at 115 n.20.

34. *Id.*

35. *See* Jay M. Feinman, *The Jurisprudence of Classification*, 41 Stan. L. Rev. 661, 661-717 (1989); *Significance of Contract Theory*, *supra* note 29, at 1285-89.

36. Yorio & Thel, *supra* note 5, at 166.

37. *See* Arthur A. Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2113 (1985).

38. *See generally* Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement under Article Nine*, 137 U. Pa. L. Rev. 335 (1988) (discussing a general theory of legal interpretation regarding Article 9 of the Uniform Commercial Code).

among sophisticated scholars, the tendency toward discrete understanding frequently overcomes their appreciation for the importance of context. Yorio and Thel, for example, find the significant difference among cases in an Iowa sequence involving charitable subscriptions to be the precise wording of the subscription document, without exploring any other factors in the relationships.[39]

The idea of limited responsibility, although modified by recent developments, also still plays a central role in contract law. The classical ideal of contract was the total absence of liability unless it was assumed by bargained-for promise, and then liability would be imposed only to the extent that it had been assumed. In neoclassical law, liability can arise from something less than an explicit assumption of it and it may be shaped by background assumptions, such as trade usage and the relational liabilities imposed on certain types of activity (such as an implied warranty imposed on a merchant seller). Nevertheless, as the debate about promissory estoppel illustrates, the initial step in any contract action is to search for "the promise," without which liability will not be imposed.

Because the literature on section 90 problems is among the richest in contract law, it effectively illustrates the power of these elements of the neoclassical framework and the attempts by thoughtful neoclassical scholars to overcome them. Some of these attempts are insightful and even valiant, but it would be better to reconceptualize the framework than to attempt to modify it. It is time for a paradigm shift. To make the scope of the survey manageable, I will mention only three well-known articles: one by Randy Barnett and Mary Becker, one by Juliet Kostritsky, and one by Dan Farber and John Matheson.[40]

Barnett and Becker's survey of the case law[41] is doctrinally and factually complex, but thoroughly neoclassical. They provide careful descriptions of the facts of many cases, separating them into categories that are designed to have both explanatory and predictive power. They conclude:

> In this article, we suggest that promissory estoppel serves two of the functions served by traditional contract and tort remedies available to parties in consensual relationships: the enforcement of some promises intended as legally binding and the imposition of liability to compensate for harm caused by some misrepresentations. . . . Under promis-

39. *See* Yorio & Thel, *supra* note 5, at 161 n.342.

40. This list, added to Fuller and Perdue, Yorio and Thel, and another frequently-cited piece, Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472 (1983), indicates the unusual frequency of co-authored articles on this topic. An interesting lunch-table pastime would be to attempt to construct an explanation for this phenomenon. Economists might observe that these articles feature exhaustive surveys of the case law, which are most efficiently conducted by more than one person. Sociologists might note the connection between the essence of the doctrine—trust which causes reliance—and the type of cooperation required in joint authorship. And so on.

41. *See* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 Hofstra L. Rev. 443 (1987).

> sory estoppel, some promises intended as legally binding are enforced though some traditional formal requirement, such as the requirement of bargained-for consideration, is lacking. In addition, some promissory misrepresentations are remedied, though no remedy would be available under traditional contract and tort doctrines.[42]

Barnett and Becker are innovative in using tort as well as contract categories, but both are neoclassical categories. In contract, for example, promissory estoppel serves as a consideration substitute and as a device to avoid other formal bars to enforcement, such as the Statute of Frauds. Accordingly, the authors accept the neoclassical element of a limited baseline of responsibility; their contribution is to demonstrate that the courts have used section 90 doctrine to increase the instances in which liability has been assumed by promising or in which liability may be imposed because of misrepresentations. Additionally, the authors implicitly adopt the neoclassical focus on discrete promises or on the discrete aspect of relationships. In discussing a number of cases, they do carefully detailed readings to find that either a contract existed, or that a close substitute did through promissory estoppel.[43]

Kostritsky's article[44] focuses even more clearly on the discrete, bargained-for promise as the basis of contractual liability. Her article incorporates the doctrinal hierarchy that I have always taught my students: Look first for the contract that meets traditional requirements; if and only if it is not available, look for a section 90 cause of action. The innovation in her article is to identify the circumstances in which "barriers to, or explanations for the parties dispensing with, explicitly reciprocal or formalized contracting exist and a plausible benefit to the promisor can be identified"[45] so that contractual liability should attach anyway, through section 90. Her analysis of the cases reveals that the courts focus on several factors in determining whether such barriers or explanations exist: "(1) the relative status and knowledge of the parties; (2) the enmeshment of the parties [in some broader relationship]; and (3) [the existence of] trust and confidence relations [between the parties]."[46]

Kostritsky's analysis is helpful in describing the effect of the three factors in promissory estoppel cases. While none of them are particularly startling, it is useful to have them delineated and supported by the case law. The odd part of the article is the discontinuity between much of the analysis and the theoretical framework expressed in the article's title. The analysis of status and relationship in the cases has the potential for undermining the neoclassical focus on discrete, explicit promise as the basis of liability. Yet, in the article, the analysis is used in the service of

42. *Id.* at 445-46 (citations omitted).

43. *See, e.g., id.* at 455-57, 464-66.

44. *See* Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel*, 33 Wayne L. Rev. 895 (1987).

45. *Id.* at 905 (citations omitted).

46. *Id.* at 905 n.28.

"A New Theory of *Assent*-Based Liability."[47] Assent is, of course, at the heart of the neoclassical emphasis on promising. While Kostritsky advances our understanding of the area considerably, she does not make a significant enough move beyond the neoclassical approach.

Farber and Matheson[48] move the furthest away from the neoclassical framework. Like Kostritsky, they analyze a number of situations which are not amenable to traditional bargain transactions; these involve promissory estoppel as a consideration substitute. Like Yorio and Thel, they note the growing range of transactions in which section 90 liability is imposed and the declining emphasis on reliance in establishing liability under section 90. In their most important departure from the neoclassical model, they note that those transactions have two common features:

> First, . . . the promisor's primary motive for making the promise is typically to obtain an economic benefit. Second, the enforced promises generally occur in the context of a relationship that is or is expected to be ongoing rather than in the context of a discrete transaction. These relationships are characterized by a need for a high level of mutual confidence and trust.[49]

In this major move away from the strictures of neoclassical law, Farber and Matheson recognize that complex relations rather than discrete transactions can be the basic unit of contractual analysis and that relationship rather than promise can be the basis of liability. They are not prepared to make a complete move, however, retaining the idea of promise but situating it within relations. They even engage in what is perhaps the ultimate neoclassical enterprise in drafting a proposed section for a *Restatement (Third) of Contracts*: "A promise is enforceable when made in furtherance of an economic activity."[50]

II. THE RELATIONAL APPROACH

I propose that contract law should take one step beyond Farber and Matheson and embrace a truly relational analysis. This relational approach would constitute revolutionary science, rather than a further attempt to refine the normal science of neoclassical law. As particularly relevant to promissory estoppel, this move would replace the neoclassical elements of a focus on promise and a baseline of limited liability with the ideas that relationships are both different from, and more common than, discrete transactions. Furthermore, relationships necessarily involve obligations; the only questions are what kinds of obligations different relationships involve and which of those obligations should be translated into legal obligations.

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47. *See* Kostritsky, *supra* note 44, at 895 (emphasis added).

48. *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. Chi. L. Rev. 903 (1985).

49. *Id.* at 925.

50. *Id.* at 930.

Earlier I pointed out that neoclassical theories of promissory estoppel contain descriptive and prescriptive components. Likewise, relational theory can be used both to describe the state of the case law and to prescribe the direction it ought to take. The description comes from a new framework, but it still can be useful to neoclassically trained lawyers and scholars. Relational theory provides a new approach to familiar cases, which I elaborate on below. It also refocuses the insights of the scholars. For example, the useful insights of Kostritsky, and of Farber and Matheson, take on added importance when placed in a relational perspective.

The prescriptive basis of relational theory is more complex. The relational approach is most appropriately viewed as a framework for analysis and argument, rather than a concrete set of principles that lead to fixed results. Nevertheless, the relational approach embodies a set of values that differ from those expressed in neoclassical law. Ian Macneil, the originator of relational contract theory, has explored the historical and ahistorical dimensions of neoclassical and relational values.[51] Here I want to emphasize a similarity and a difference between relational theory and neoclassical law.

The similarity is in the objective of both bodies of law. Both have as a principal end the development of a system of law that supports and regulates productive exchange behavior in society. In light of that objective, doing away with promissory estoppel would not mean that its fundamental objective will no longer be served, but that it will be served differently. The apparent objective of promissory estoppel, as the scholarly surveys from Fuller and Perdue to Yorio and Thel have shown us, is to correct the inadequacies of traditional contract doctrine, and particularly the limits of bargain consideration. As relational contract eliminates those inadequacies, the need for the established section 90 doctrine will fade, although its fundamental goal of supporting commercial behavior and preventing injustice will not.

The difference in the values of neoclassical and relational contract lies in the baseline approach to obligation. Neoclassical contract emphasizes the autonomy of individuals from each other, and the limited liability that that autonomy necessitates. Relational contract, in contrast, emphasizes the interdependence of individuals in social and economic relationships. Because its paradigmatic unit of inquiry is the extensive relation rather than the discrete transaction, relational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection among people. Not all of these bonds should be legally enforceable, but beginning analysis by recognizing them is likely to produce a broader set of legal obligations.

51. *See* Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. Rev. 340 (1983). The account of the prescriptive basis of relational contract theory in this essay is my own, and it should not be assumed that Macneil or other relational theorists would subscribe to it in all its detail.

Relational analysis entails several steps.[52] The first step responds to the neoclassical focus on discrete transactions by describing the range of types of exchange interactions that occur, from the wholly discrete to the wholly relational. There are three paradigmatic cases: a discrete transaction, a discrete transaction which takes place within a system of relationships, and a complex relation. The second step is to develop and apply the norms relevant to the understanding and evaluation of the transaction or relation. These norms include both norms generated internally by the parties and external social norms. The norms differ depending on the type of case under scrutiny. In a discrete transaction, for example, implementing planning and effectuating consent are particularly important, while contractual solidarity and flexibility are more important in an ongoing relation. The third step is to decide whether and how the norms can be effectively implemented through rules of legal obligation. For example, while contractual solidarity may be important in preserving relations, in some situations to impose a legal standard of solidarity might create disharmony instead.

The application of a full relational approach can be quite complex, so I only suggest some of the ways in which this approach could contribute to the reevaluation of promissory estoppel. This is not to suggest that the relational approach provides rules of easy application to classes of cases. It may turn out to be true that in using a relational approach we would conclude that, for example, many charitable subscriptions should be enforceable, as should many promises by employers to employees, whereas family promises would not. But those results are the product of complex analysis in individual situations, rather than *Restatement*-like rules.

Begin with cases near the discrete end of the discrete-relational continuum. Section 90 doctrine deals reasonably well with these cases as it stands, although the scholarly dispute about exactly how it does so indicates that it could be clarified. Absent the kind of obligation that accompanies relational characteristics, the issue in these cases is the extent to which the parties' words and conduct indicate substantial planning and understanding of the significance of the consequences of the words and conduct (i.e., consent). In discrete cases, it may be reasonable to require evidence of this planning through a degree of specificity in the statement and a definite and substantial act of reliance. Where an employer offers a job to a prospective employee and encourages her to quit her job in reliance on the offer, for example, there is sufficient evidence of planning and consent to impose liability.[53]

52. *See Significance of Contract Theory, supra* note 29, at 1300-04. For an application of the relational approach, see Patricia A. Brown & Jay M. Feinman, *Economic Loss, Commercial Practices, and Legal Process*: Spring Motors Distributors, Inc. v. Ford Motor Co., 22 Rutgers L.J. 301, 348-59 (1991).

53. The example is drawn from Hunter v. Hayes, 533 P.2d 952 (Colo. Ct. App. 1975). Note that the relational analysis in the text provides both a relational description of the court's result and an evaluation of its soundness.

Moving farther along the continuum, consider two much-discussed insurance cases, *Prudential Insurance Co. of America v. Clark*[54] and *Marker v. Preferred Fire Insurance Co.*[55] In *Clark*, an insurance agent's promise to a Vietnam-bound Marine that an insurance policy would be issued without a war-risk exclusion was held to be enforceable. In *Marker*, the promise by an insurance agent to the purchaser of property, who was himself an attorney and an insurance agent, to notify the purchaser of the expiration of the policy covering the property was held to be unenforceable.

The differing results in these two cases have been explained and justified on various grounds. These include the presence or absence of reasonable reliance, the economic benefit to the promisor in *Clark* and the absence of such benefit to the promisor in *Marker*, the inequality of status and knowledge in the former case but not in the latter, and the differing levels of commitment in each case. All of these factors are relevant, but the question is, what kind of analysis best expresses them? A relational analysis might begin by noting that each case presents a somewhat discrete situation; in neither case is there an extensive relationship between the parties. Therefore, analysis should begin by focusing on the presence of planning and other indicia of consent, a focus which probably yields greater results for the promisee in *Clark* than in *Marker*.

However, neither case is entirely discrete; each has some relational characteristics. In *Clark*, the significance of the relationship is the expert role assumed by the agent relative to the insured, and the extent of the insurance company's power to control the terms of the formal contract which is issued subsequent to the agent's representations about its contents. Both of these elements arise because the specific events occur within a complex, bureaucratic system for the sale of insurance. These characteristics carry with them a heightened obligation. In the final step of the process, note that the imposition of liability is likely to strengthen the relation; insurance companies will be more inclined to control their agent's sales talk, or suffer the consequences. In *Marker*, on the other hand, the extent of the property purchaser's dependence on the agent is lower, because of the more equal status of the parties and because of the purchaser's statements explicitly disclaiming the possibility of a long-term business relationship with the agent.

Consider next the cases involving promises, representations, and assurances made by an employer to an employee during the course of employment. These cases often involve promises to pay bonuses or pension benefits or promises regarding the duration of employment, or even promises to keep a plant open. Scholars take different approaches to these cases, variously emphasizing the "implicit bargain" or the "public policy" involved,[56] the economic nature of the set-

54. 456 F.2d 932 (5th Cir. 1972).
55. 506 P.2d 1163 (Kan. 1973).
56. *See* Barnett & Becker, *supra* note 41, at 468-69.

ting,[57] or the status of the parties.[58] All of these are helpful, but none of them is complete. To say, for example, as Farber and Matheson do, that these promises ought to be enforceable because they are in furtherance of economic activity does little to help us distinguish which of these statements constitute a promise. The advantages of relational analysis here are to direct our attention to the extensive, responsibility-creating nature of the employment relationship, to provide a vocabulary for analyzing its elements, and to emphasize the care with which the legal system must intervene.

Finally, consider *Hoffman v. Red Owl Stores, Inc.*,[59] probably the most famous of all section 90 cases. The decision always has been problematic. As Yorio and Thel note,

> [t]he court may have found a promise, however, because it saw no other basis on which to hold for Hoffman, shoehorning the facts into Section 90 in order to afford Hoffman some relief for what the trial judge apparently regarded as (negligent) misrepresentation by Red Owl's agent.[60]

Hoffman can hardly be understood on the basis of promissory estoppel doctrine. As Barnett and Becker suggest, it may be better understood as a tort case involving negligent misrepresentation[61] of a peculiar kind. It can be best understood, though, as a relational case. The relational analysis would proceed at two levels; it would examine the interactions between the parties, which extended over several years, involved many different issues, and were conducted by several agents of Red Owl, and would then look at the broader setting in which franchisors and their agents employ a variety of techniques to procure franchisees. That kind of analysis, not constrained by notions of promise or reliance, would provide a better understanding of how courts treat such cases and how they should do so. It might well provide a contested understanding; we could argue about the appropriate scope of liability of franchisors for the acts of their agents in particular settings, but at least the argument would proceed from a fuller understanding of the case, and one that is more attuned to the responsibilities that arise from relationships.

CONCLUSION

Is it likely that we will soon stop talking in terms of promissory estoppel and of the neoclassical framework of which it is a part? Perhaps not, as the weight of tradition is very great. There is, however, a growing recognition that the framework is ailing, if not moribund. The repeated attempts by neoclassical scholars to redescribe, reclassify, and reconcep-

57. *See* Farber & Matheson, *supra* note 48, at 922.
58. *See* Kostritsky, *supra* note 44, at 915.
59. 133 N.W.2d 267 (Wis. 1965).
60. Yorio & Thel, *supra* note 5, at 143 (citations omitted).
61. *See* Barnett & Becker, *supra* note 41, at 489-91.

tualize section 90 cases seems to me to be a recognition of difficulty. Furthermore, over the last few years the increased significance in contract scholarship of law and economics, rational choice theory, rights theories, relational theory, empirical studies of contract, critical legal studies, and feminist theory as competitors of neoclassical contract are further symptoms of illness.[62] The prescription, it seems to me, is to stop addressing old questions—by debating whether the core of section 90 is promise or reliance, for example—and address the more fundamental issue of what kind of framework we should have, for that will determine the questions we should ask.

62. *See, e.g., Significance of Contract Theory, supra* note 29, at 1283-1318 (explaining and examining each of the principal competitors to neoclassical contract theory).