
Negligent Misrepresentation as Contract

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Source: *California Law Review*, August 2013, Vol. 101, No. 4 (August 2013), pp. 953-1011

Published by: California Law Review, Inc.

Stable URL: <https://www.jstor.org/stable/23784323>

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Negligent Misrepresentation as Contract

Mark P. Gergen*

This Article challenges the prevailing view in the United States, and everywhere else in the common law world, which classifies the claim of negligent misrepresentation as a tort. I argue negligent misrepresentation is best understood as a contractual claim akin to promissory estoppel, with the gist of both claims being invited reliance. The prevailing view is an unfortunate byproduct of classical theories of contract and the idealization of contract as essentially private legislation. The classification of the claim as a tort is unfortunate because the rise of the modern tort of negligence, which has at its heart a principle of liability for harm carelessly caused, creates a risk that the tort of negligent misrepresentation will be subsumed into a general tort of negligence. Subsuming the claim into negligence will efface important features of the claim. Classifying the claim as contractual, however, will preserve these features while reinforcing largely positive trends in modern contract law.

To make this case, the Article traces debates on the best theories of contract, tort, and negligence law from the mid-nineteenth century to the present. A long and broad view of these debates highlights a phenomenon that theorists who focus on specific fields overlook. In each of these fields, the best theory accounting for the core of the field does a poor job accounting for its periphery. Modern variations on classical theories of contract, like promise-based theories, brilliantly account for the core of contract law. Similarly, the theory of negligence as liability for harm carelessly caused brilliantly accounts for the core of negligence law. However, both theories fail in explaining the periphery of their respective fields of law. Promise-based theories of contract are too parsimonious and constrictive. They tend to reduce contract to a perfect circle of private legislation. The negligence principle is too general and open-ended, and it

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unhelpfully effaces the rich morality of the common law. Treating negligent misrepresentation as a problem of contract pushes back against both of these tendencies. It makes the domain of contract less constrictive and confines the domain of negligence.

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INTRODUCTION AND OVERVIEW

On Monday, September 8, 2008, shortly before the New York Stock Exchange opened at 9:30 a.m., market watchers were surprised to see a report on the Bloomberg wire that United Airlines had filed for bankruptcy.¹ The report immediately triggered sales by automatic trading systems. United's share price dropped from \$12.30 per share, its closing price on the preceding Friday, to around \$3.00, its price when trading was halted at 10:07 a.m. After United assured the world it had not filed for bankruptcy, trading in the stock resumed at 11:30 a.m. at \$10.92 per share. The seeds for the false report of United's financial demise were likely planted shortly after midnight East Coast time Sunday, when someone clicked on an archived news article about United's 2002 bankruptcy on the website of the *South Florida Sun Sentinel*. One click sufficed to put the story on the site's list of the most-viewed stories of the day.

1. See *How a Chain of Mistakes Hurt Shares of United*, N.Y. TIMES (Sept. 15, 2008), <http://dealbook.nytimes.com/2008/09/15/how-a-chain-of-mistakes-hurt-shares-of-united>. But see Bernhard Warner, *Robots Take Their Toll on the Financial Markets*, TIMES ONLINE (Sept. 10, 2008), <http://www.thetimes.co.uk/tto/technology/internet/article1861090.ece> (facts differ on some details). Neither story indicates any of the trades were reversed or broken by the New York Stock Exchange. At the time, each exchange had its own rules for breaking clearly erroneous trades. Since 2009, these have been standardized following the SEC's promulgation of model rules. See Self-Regulatory Organizations, Exchange Act Release No. 34-60706 (Sept. 22, 2009) (SR-NYSEArca-2009-36).

A Google program, called a spider, which skims the Internet for news stories around every fifteen minutes, found the listing and followed it to the undated, archived news article. The program filled in the current date, September 6, 2008, atop the web page. Early Monday morning, an employee of Income Securities Advisors found the story in a Google search for 2008 bankruptcies. Without pausing to read the story, which would have made the misdating clear, the employee passed on a summary to Bloomberg. Someone at Bloomberg then flashed a bulletin to the world, reporting United's bankruptcy without checking the story.

The incident was a product of human carelessness. An employee of Income Securities Advisors carelessly passed on doubtful and alarming information about a large company to a news service without checking its accuracy. An employee of Bloomberg carelessly broadcast the information without checking its content. One might also fault the people at Google who designed a search engine that could misdate newsworthy information it compiles. However, while people were careless, it is clear no one is legally liable for the resulting losses. In almost every American state, the economic loss rule bars a negligence claim on these facts.² A claim for negligent misrepresentation is barred on these facts by another rule that shields information suppliers from claims that would expose them to indeterminate liability.³ By contrast, comparable carelessness resulting in comparably

2. A rule that a claim will not lie for pure economic loss first appears in products liability cases in the 1960s and 1970s. See Gary T. Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, in *PURE ECONOMIC LOSS IN EUROPE* 94, 94–119 (Mauro Bussani & Vernon Valentine Palmer eds., 2003). *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965), is the landmark case. *Seely* follows in the footsteps of Prosser's drafts of RESTATEMENT (SECOND) OF TORTS § 402A (1965), which in its final form stated that a seller of a defective product that was "unreasonably dangerous to the user or consumer or to his property" was liable "for physical harm thereby caused to the ultimate user or consumer, or to his property." Earlier drafts limit the rule even further to products such as food and cosmetics intended for "intimate bodily use." RESTATEMENT (SECOND) OF TORTS, § 402A (Tentative Draft No. 7, 1962). Two Idaho cases from 1978, *Just's, Inc. v. Arrington Constr. Co.*, 583 P.2d 997 (Idaho 1978) and *Clark v. Int'l Harvester Co.*, 581 P.2d 784 (Idaho 1978), pull together the strands of RESTATEMENT (SECOND) OF TORTS § 766C (1977), Prosser's work on products liability, *Stevenson v. E. Ohio Gas Co.*, 78 N.E.2d 200 (Ohio Ct. App. 1946), and Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43 (1972). The two Idaho cases state a general rule barring recovery for pure economic loss in a negligence and products action. *Union Oil Co. v. Oppen*, 501 F.2d 558, 563 (9th Cir. 1974), pulls together these strands and the cases that are the basis for Illustrations 2–4 as authority for a "general rule" of no recovery for pure economic loss in negligence.

In many states the economic loss rule is a general bar to a negligence action for solely pecuniary harm that is subject to a few exceptions, typically the actions for negligent misrepresentation and first party professional malpractice. See, e.g., *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (Ill. 1982); *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998); *Clark v. Rowe*, 701 N.E.2d 624 (Mass. 1998); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365 (N.Y. 1992); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); *Springfield Hydroelec. Co. v. Copp*, 779 A.2d 67 (Vt. 2001).

3. See RESTATEMENT (SECOND) OF TORTS § 552(2) (1977) (limiting liability to a "limited group of persons" whom the actor intends to use the information and to intended uses). Carl Pacini &

widespread physical harm would have generated epic mass tort litigation.⁴ And if an employee of a firm with suitably deep pockets knowingly planted the story, there would have been epic securities fraud litigation.⁵ But because the loss was solely pecuniary and resulted from mere carelessness, no one had any hope for legal redress.

The United Airlines incident illustrates the usual reasons why we have hard and fast rules limiting negligence liability for pure economic loss. These reasons are largely instrumental and economic, and include: (1) the disjunction between the private and social cost of an accident when a loss to one person is largely offset by another's gain,⁶ (2) the administrative cost and risk of error in determining causation and contributory fault when an accident involves far-flung losses;⁷ and (3) the unfairness, pointlessness, and perversity of holding an actor liable for gargantuan losses that are inestimable and uninsurable in advance and beyond the capacity of anyone to bear in the event.⁸ Imposing

David Sinason, *Gaining a New Balance in Accountants' Liability to Nonclients for Negligence: Recent Developments and Emerging Trends*, 103 COM. L.J. 15, 27 (1998), reports that eighteen of thirty-six states purport to follow the Restatement by judicial decision or statute, though two (Minnesota and Texas) have an avowedly liberal interpretation. By their count thirteen states require privity or near privity. New York is the leading example, requiring a direct contact between an information supplier and a plaintiff. See *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985). California law requires that the information be supplied with the intent of influencing the claimant (or the class) in a specific transaction. *Bily v. Arthur Young & Co.*, 834 P.2d 745, 768-71 (Cal. 1992).

4. For the story of the immediate legal aftermath of the wreck of the Exxon Valdez see Deborah S. Bardwick, *The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study*, 19 STAN. ENVTL. L.J. 259 (2000). The author reports that hundreds of lawyers descended on the state and filed thousands of claims. *Id.* at 262.

5. The persons who sold the stock that morning would have a slam-dunk fraud on the market claim. The theory of fraud on the market is available for stock that is traded on an "efficient market" so long as there is a sufficient correlation between the dissemination of the false information and a change in market price. See Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 161-62 (2009).

6. William Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347 (1986); Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 INT'L REV. L. & ECON. 589 (1997); Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 733-45 (2004).

7. Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 J. LEGAL STUD. 1 (1994), argues that the difficulty of determining the claimant's contributory fault (both pre- and post-accident) justifies the exclusion of liability for indeterminate losses. He also makes the point that when an accident has far-flung economic consequences imposing liability for all losses is likely to over-deter because there will be offsetting gains realized by firms that can better utilize existing assets. *Id.*; see also Perry, *supra* note 6 (concluding that an amalgam of economic arguments adequately explains the general rule excluding recovery for relational losses and its exceptions).

8. See James, *supra* note 2, at 45 ("The explanation . . . is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions may be far wider, indeed virtually open-ended."). James adds that economic losses in the nature of consequential damages are best covered by first-party insurance, as the victim best knows its risk of loss. Like others who think this the reason for precluding negligence liability for solely pecuniary harm, James concludes the bar should be limited to indeterminate losses. *Id.* at 53; see also Robert L.

negligence liability on the firms responsible for the losses in the United Airlines incident would be an expensive exercise, and more importantly, such imposition would be counter-indicated if the goal were minimizing the social cost of accidents. The exercise would also be of dubious value at best if the goal is vindicating rights and redressing wrongs. The concerns for the cost and risk of error in resolving claims justify having hard and fast rules to dispose of such claims.

These reasons, while compelling, distract us from a more fundamental set of reasons that explain why common law courts routinely reject negligence liability for pure economic loss in cases in which the modern negligence principle may well suggest liability. These other reasons can be summarized in the form of a taxonomic claim: negligent misrepresentation is best understood as a contractual claim that requires invited reliance, much like promissory estoppel. Thus, because Google, Income Securities Advisors, and Bloomberg never reasonably appeared to invite—or to intend to invite—attachment of substantial weight onto the United Airlines report, they have no possible liability to sellers who acted on the report. The indeterminacy of the potential liability buttresses the conclusion that no one undertook a duty of care in supplying information in the United case, but in my view indeterminacy of liability is neither necessary nor perhaps sufficient to determinations that no duty of care has been undertaken.

Underlying this taxonomic claim is the view that liability for carelessly misleading another in a way that causes purely economic harm is strongly relational and weakly prioritizes private ordering. In both respects this jibes with modern American contract law, specifically those parts that protect reliance on informal commercial understandings, and in particular, with the doctrine of promissory estoppel. The obligation involved when one actor carelessly misleads another is strongly relational because liability generally requires the existence of a special type of relationship, one in which an actor appears to invite another to rely on information supplied to guide the other's action. This special relationship is similar to that created by informal promises or agreements. The law of negligent misrepresentation weakly prioritizes private ordering by providing a legal space for people to regulate their own affairs. It does so by honoring agreements people do make and by declining to imply an obligation in circumstances in which it is impractical and unwise to insist that an actor secure an agreement negating an implied obligation.

This taxonomic claim goes to the heart of a disagreement between me and some other participants in the American Law Institute project on economic torts that led to my resignation as Reporter for the project. They think the law of negligent misrepresentation (or negligent misstatement, as it is known

Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

elsewhere in the common law world) is best understood as part of negligence law. Taxonomy matters. A wise friend counseled me against proceeding with the project while leaving this disagreement unresolved. My friend warned that disagreement on a tectonic issue would manifest repeatedly in debates over issues big and small. I think you will see the wisdom of my friend's advice once I get down to the details of my argument.

In its ambitions, my argument is interpretive and analytical but not normative. An interpretive, analytical account of an area of the law attempts to define the area's essential characteristics, largely taking the law on its own terms.⁹ In reclassifying the law of negligent misrepresentation as akin to contract, I take a broad and historical perspective, examining theoretical accounts of contract, torts, negligence, and negligent misrepresentation over the last two centuries. As you shall see, current theoretical arguments about the best theory of contract law track arguments made in the nineteenth century. Consequently, history illuminates the basic trade-offs required in constructing a theory of obligation that is largely based on a desire to facilitate private ordering, as contract law is today. While nineteenth century legal theorists say little of interest about the nature of tort law and negligence law, it is illuminating to juxtapose the dominant theory of negligence today with classical theories of contract. The theories have parallel strengths and mirror-image weaknesses. The juxtaposition teaches that the best account of the cores of negligence and contract cannot be applied overly rigorously at the periphery either to limit the scope of the field (this is the mistake invited by classical theories of contract) or to expand the scope of the field (this is the mistake invited by the dominant theory of negligence today).

Some may object that while my account of negligent misrepresentation may be descriptively accurate, analytically perspicacious, and well-grounded historically, it is normatively unappealing because the law of negligent misrepresentation, like classical contract law, rests on unrealistic assumptions about the capacity of people to protect themselves from the carelessness and cupidity of others in the marketplace. My response is that while I would confine negligent misrepresentation to cases of invited reliance, I would leave open the possibility of negligence liability in the form of a situation-specific cause of action or liability rule to protect especially vulnerable claimants from what is in retrospect clearly unreasonable conduct.

9. STEPHEN A. SMITH, *CONTRACT THEORY* 43 (2004). I expand on the goals of such a theory in Part III.A when I respond to Smith's argument that the best theory of contract excludes liability from negligent misstatement from contract.

I.

NEGLIGENT MISREPRESENTATION: AN OBLIGATION OF INVITED RELIANCE

My claim that negligent misrepresentation is best treated as a problem akin to contract depends largely on a claim that the concept of invited reliance has a great deal of explanatory power in this area of law.¹⁰ An actor invites reliance when he supplies information *with an apparent purpose* that the recipient be able to rely on the information. To take a clear example, an actor invites reliance when he supplies information to another and says, "I want you to be able to rely on this." The concept of invited reliance best explains when an actor has a duty of care in supplying information, the content of the duty of care, the scope of liability for breach of the duty, the effect of exculpatory terms, and much more. This Section sketches the contours of that claim, leaving a detailed discussion of how negligent misrepresentation came to be divorced from contract for later Parts.

Inviting reliance is like promising, warranting, and contracting. When *A* invites *B* to rely on a statement *x*, it is like *A* promising *B* to do *x* or *A* warranting fact *x* to *B*. In each case *A* communicates *x* with an apparent purpose that *B* be able to rely on *x* or *x*'s occurrence. Of course, there are differences between inviting reliance, promising, warranting, and contracting. Inviting reliance on a statement *x* is unlike promising to do *x*. It does not entail a commitment by *A* to *B* to bring about *x* in the future. Inviting reliance on a statement *x* is unlike expressly warranting *x* or expressly contracting to do *x*. *A* may invite reliance without appearing to intend to give *B* the power to seek redress from *A* in a court should *x* not be true or should *A* not do *x*. Conversely, expressions of warranty and expressions of contract commonly suggest that the parties understand the communication to have legal consequence. These differences are not small. Over the last 150 years some very smart people who have thought deeply about what undertakings should be described as contractual have come to the conclusion that inviting reliance is sufficiently unlike promising, warranting, and contracting that obligations based on invited reliance belong outside of contract law.

But the differences between inviting reliance, promising, warranting, and contracting pale in comparison to the differences between invited reliance and the modern negligence principle. Under the concept of invited reliance, liability for carelessly supplying false or misleading information that harms another requires a special sort of communicative relationship between the information supplier and the victim. By contrast, the modern negligence principle is a rule

10. I take the point and the concept from Stephen Perry, who argues that the concept of an undertaking, which he defines in terms of invited reliance, accurately captures when courts do and do not impose a duty of care on an actor whose conduct creates a risk of solely pecuniary harm to another. Stephen R. Perry, *Protected Interests and Undertakings in the Law of Economic Negligence*, 42 U. TORONTO L.J. 247, 281 (1992).

of prima facie liability for harm carelessly caused.¹¹ Under the familiar principle, *A* owes a duty of reasonable care to *B* in doing *x* if *x* creates a foreseeable risk of harm to *B*. If the liability rules for negligent misrepresentation flowed directly from the general negligence principle, *A* would be subject to liability to *B* if *A* failed to use reasonable care in misstating *x* and the harm was among the risks that made *A*'s misstatement of *x* unreasonable. For example, if the modern negligence principle applied in its pure form, then a drug testing company hired by an employer to screen employees would owe a duty of care to a tested employee because carelessness resulting in a false positive would predictably harm the employee. While this conduct might be negligent under the broad principle of modern negligence, there is no possible negligent misrepresentation claim.¹² The absence of invited reliance explains why. The harm that befalls the employee is not a result of the employee's acting in reliance on information supplied by the company to the employee. There is no reliance in this case, much less invited reliance.

The absence of invited reliance also explains why a lender owes no duty of care to a borrower when the lender inspects the borrower's property for its own security interests and thereafter creates a report that it knows the buyer will receive and rely upon.¹³ It explains why an actor who prepares a report to

11. See Part III.B.

12. American courts are split on whether a negligence claim is available in this situation. See *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995) (rejecting a negligence claim); *Hall v. United Parcel Serv.*, 555 N.E.2d 273 (N.Y. 1990) (holding the same for a polygraph exam); *Erpelding v. Lisek*, 71 P.3d 754 (Wyo. 2003) (holding the same for a psychological evaluation). *But see Devine v. Roche Biomed. Labs., Inc.*, 637 A.2d 441 (Me. 1994) (allowing a claim by the employer against the drug tester for negligently misrepresenting the trustworthiness of the test); *Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215 (Pa. 2003) (allowing a claim against a hospital for mishandling the claimant's urine sample); *Duncan v. Afton, Inc.*, 991 P.2d 739 (Wyo. 1999) (allowing a negligence claim on drug testing); Amy Newnam & Jay M. Feinman, *Liability of a Laboratory for Negligent Employment or Pre-Employment Drug Testing*, 30 RUTGERS L.J. 473 (1999) (arguing that negligence actions should be allowed based on the general view that redress for negligence resulting in solely pecuniary harm should be denied only if there is a specter of indeterminate liability). For more information, see Claudia G. Catalano, Annotation, *Employee's Action in Tort Against Party Administering Polygraph, Drug, or Similar Test at Request of Actual or Prospective Employer*, 89 A.L.R.4th 527 (1991) (listing cases on both sides of the point as well as cases addressing other theories of liability, including defamation).

13. *Meyers v. Guarantee Sav. & Loan Ass'n*, 144 Cal. Rptr. 616 (Cal. App. 1978); *Butts v. Atlanta Fed. Sav. & Loan Ass'n*, 262 S.E.2d 230 (Ga. App. 1979); *Daniels v. Army Nat'l Bank*, 822 P.2d 39 (Kan. 1991); *Rzepiennik v. U.S. Home Corp.*, 534 A.2d 89 (N.J. Super. 1987); *Henry v. First Fed. Sav. & Loan Ass'n*, 459 A.2d 772 (Pa. Super. 1983); *Peterson v. Mut. Sav. Inst.*, 646 S.W.2d 327 (Tex. Civ. App. 1983).

To the same effect are the many cases holding that a title insurer owes no duty to the insured when it evaluates title to determine insurability. See, e.g., *Brown's Tie & Lumber Co. v. Chi. Title Co. of Idaho*, 764 P.2d 423 (Idaho 1988); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 562 A.2d 208 (N.J. 1989); *Stewart Title Guar. Co. v. Cheatham*, 764 S.W.2d 315 (Tex. App. 1988); *Greenberg v. Stewart Title Guar. Co.*, 492 N.W.2d 147 (Wis. 1992); *Hulse v. First Am. Title Co.*, 33 P.3d 122 (Wyo. 2001). For the contrary view see *Title Ins. Co. of Minn. v. Costain Ariz., Inc.*, 791 P.2d 1086 (Ariz. App. 1990); *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553 (Fla. Dist. Ct. App. 1984); *Ford*

guide one party in a transaction owes no duty of care to another party to the same transaction even if the other party predictably relies on the report.¹⁴ A duty would be owed in both cases under the negligence principle.

Conversely, the presence of invited reliance explains cases in which an information supplier is liable to a user of information who is remote in time and space from the supplier. For example, a surveyor who supplied to a builder a survey of property bearing the legend “This plat of survey carries our absolute guarantee for accuracy” was held to owe a duty of care to a buyer of the property to whom the builder passed on the survey.¹⁵ The legend led the buyer reasonably to believe that the stranger who produced the survey wanted him to be able to rely on it. The concept of invited reliance also explains why there is unquestionably a duty of care when an agent supplies information to a principal or a professional person supplies information to a client.¹⁶ The very nature of the relationship presupposes an invitation to the client to rely on the information. Indeed, the presumption is that the information is supplied solely for the purpose of serving the recipient.

The concept of invited reliance is consistent with but more accurate than the other verbal formulae courts use to determine duty. One formula requires that an actor be in the business of supplying information and that the information be supplied to guide the recipient in dealings with third parties.¹⁷ Another formula requires that a plaintiff and defendant be in a “special

v. Guarantee Abstract & Title Co., 553 P.2d 254 (Kan. 1976); Heyd v. Chi. Title Ins. Co., 354 N.W.2d 154 (Neb. 1984).

14. See *Goodman v. Kennedy*, 556 P.2d 737 (Cal. 1976) (holding that an attorney who supplies an opinion to a client regarding a transaction has no duty to other parties to the transaction even if they predictably rely on the opinion); *Hughes v. Holt*, 435 A.2d 687 (Vt. 1981) (holding that an inspector who supplies a report to an owner of property to enable the owner to refinance owes no duty of care to a subsequent purchaser to whom the buyer passes on the report); see also *Fisher v. Comer Plantation, Inc.*, 772 So. 2d 455 (Ala. 2000); *Hoffman v. Greenberg*, 767 P.2d 725 (Ariz. Ct. App. 1988).

15. *Rozny v. Marnul*, 250 N.E.2d 656, 658 (Ill. 1969); see also *Kent v. Bartlett*, 122 Cal. Rptr. 615 (Ct. App. 1975); *Hostetler v. W. Gray & Co., Inc.*, 523 So. 2d 1359 (La. Ct. App. 1988); *Hanneman v. Downer*, 871 P.2d 279 (Nev. 1994); *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231 (Tex. App. 1985); *Ivalis v. Curtis*, 496 N.W.2d 690 (Wis. Ct. App. 1993).

16. See *Fleming James, Jr. & Oscar S. Grey, Misrepresentation—Part I*, 37 MD. L. REV. 286, 308 (1977) (stating that courts have been “sluggish” in extending the duty of care beyond the duty “[a]n agent may owe . . . his principal, a trustee to his beneficiary, or a professional man to his client”).

17. This is the rule in Illinois. See, e.g., *DuQuoin State Bank v. Norris City State Bank*, 595 N.E.2d 678 (Ill. App. Ct. 1992); see also *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, (Ill. App. Ct. 2005) (looking past the rule to hold that a duty of care should not be imposed upon a title insurer to disclose a defect in a title commitment when the effect would be to hold the insurer liable for risks greater than those it agreed to bear in the transaction). The Illinois rule has led to courts giving short shrift to some claims that would have been viable elsewhere. See, e.g., *Univ. of Chi. Hosps. v. United Parcel Serv.*, 596 N.E.2d 688, 691 (Ill. Ct. App. 1992) (holding that an insurer is not liable to a hospital that accepts a patient based on a false statement about insurance coverage because the insurer is not in “the business of supplying information”) (internal quotation marks omitted). But see *Decatur Mem’l Hosp. v. Conn. Gen. Life Ins. Co.*, 990 F.2d 925 (7th Cir. 1993) (applying Illinois law, the court questions the premise from *University of Chicago Hospitals*).

relationship of trust and confidence.”¹⁸ These formulae purport to identify when a duty of care exists, but they do not say much, if anything, about the content of that duty. For instance, the existing verbal formulae do not clearly explain why an actor who undertakes to advise another on a specific aspect of a transaction only owes a duty of care to the other with respect to that aspect. Under existing case law, an agent hired to obtain homeowner’s insurance has no duty to inform the homeowner of the desirability of flood insurance.¹⁹ Similarly, a broker hired to sell land and buy other land has no duty to advise a client of the possibility of structuring the transaction as a tax-free exchange.²⁰ The existing formulae offer little guidance about why this should be so. Classifying the relationship between a homeowner and an insurance agent based on whether it involves trust and confidence tells us little about why an insurance agent owes a duty of care in one aspect of a transaction and not another. Similarly, the mere fact that an actor is in the business of supplying information, and has done so to guide the recipient in third-party dealings, does not help meaningfully to illuminate which aspects of a transaction implicate the actor’s duty of care.

18. *Int’l Prods. Co. v. Erie R.R. Co.*, 155 N.E. 662 (N.Y. 1927). Later New York cases hold that in certain circumstances whether the parties stand in a “special relationship” is for the jury to decide. *See* *Kimmell v. Schaefer*, 675 N.E.2d 450, 454 (N.Y. 1996); *AFA Protective Sys. v. AT&T Co.*, 442 N.E.2d 1268, 1269 (N.Y. 1982). *But see* *Murphy v. Klein*, 682 N.E.2d 972 (N.Y. 1997) (holding that as a matter of law an insurance agent has no duty to advise a client about the adequacy of coverage). As a consequence, New York law generally is hostile to claims involving sophisticated parties who deal as equals. Meanwhile, the law in New York is more open than elsewhere to claims based on a factual misstatement regarding a prospective contract when course of dealing and relative expertise indicate a claimant reposed trust and confidence in the defendant. *See, e.g.*, *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 776 N.Y.S.2d 301 (App. Div. 2004) (assurances by provider of software regarding its capacity); *CooperVision, Inc. v. Intek Integration Techs., Inc.*, 794 N.Y.S.2d 812 (Sup. Ct. 2005) (software license and service agreement); *Fleet Bank v. Pine Knoll Corp.*, 736 N.Y.S.2d 737 (App. Div. 2002) (assurances by agent of lender that additional financing would be approved; jury question whether there was a special relationship); *Grammer v. Turits*, 706 N.Y.S.2d 453 (App. Div. 2000) (broker did not disclose construction on property adjacent to one-month vacation sublease).

19. *Nowell v. Dawn-Leavitt Agency, Inc.*, 617 P.2d 1164 (Ariz. Ct. App. 1980) (disposing of the claim on summary judgment noting policy considerations). *Nowell* is no longer good law in Arizona. *See* *Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 904 P.2d 1268, 1271 (Ariz. Ct. App. 1995) (interpreting a case involving a claim that the agent misstated the terms of the policy—*Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984)—as imposing a general duty of care on an agent obtaining insurance, and so characterizing the issue in *Nowell* as one of breach rather than duty). *Murphy*, 682 N.E.2d at 972, is a representative case holding an agent has no duty to advise a client regarding coverage absent a special relationship. California imposes a duty on an agent to advise a client regarding insurance only when the agent misstates coverage, the client requests specific coverage, or the agent holds herself out as having expertise in the specific field. *Fitzpatrick v. Hayes*, 67 Cal. Rptr. 2d 445, 452 (Ct. App. 1997). For other cases see Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 289 (1991).

20. *Carleton v. Tortosa*, 17 Cal. Rptr. 2d 734 (Ct. App. 1993). The form contract between the broker and plaintiff advised plaintiff to retain a lawyer for legal or tax advice. *Id.* at 752.

By contrast, because the concept of invited reliance focuses on the content of a communication and the context in which it is delivered, it allows for a much more nuanced and accurate account of what an actor's duty of care entails when such a duty exists. If invited reliance is the key, then actors only come under a duty of care with regard to those aspects of a transaction they have undertaken to advise about. This is so even if the actor is uniquely able to protect the client from the risk in question and even if the failure to provide further information creates a foreseeable risk of harm to the client. To return to the insurance agent and real estate broker examples cited above, invited reliance explains that there is no duty to advise clients on aspects of these transactions that are outside the scope of the actor's engagement.

The concept of invited reliance also explains the scope of liability for breach of a duty of care when such a duty is found to exist. If a plaintiff enters into a transaction relying on a defendant's negligent advice, then the defendant is liable only for losses the plaintiff incurs in the transaction that result from the particular risks about which the defendant was negligent in advising the plaintiff. For example, if a buyer purchases a house relying on an engineer's inaccurate and negligent report that the house's foundation is sound, and the home turns out to be a total loss because of soil contamination, the engineer is not liable for the loss because he did not undertake to advise the buyer about contaminants.²¹

There are additional symmetries between the law of negligent misrepresentation and contract law. Contractual modes of analysis generally determine the effect of expressions that disclaim a duty or limit the scope of liability, particularly if the expression is written. Thus, an information supplier can avoid liability to a recipient by attaching to the information a warning to the recipient not to rely or by attaching an exculpatory term.²² The law of negligence provides no comparable power to define the duties one owes by unilateral expression. For instance, a driver on a public road cannot limit his

21. The sharpest examples involve securities fraud. *See, e.g., Greenberg v. de Tessieres*, 902 F.2d 1002 (D.C. Cir. 1990) (deciding a case in which defendant failed to disclose shady background of managers of investment in charter cruise ship and the venture failed when charter party backed out); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F. Supp. 248 (S.D.N.Y. 1997) (addressing the issue of defendant misrepresenting risk on repo agreement in a case in which an investment in a tax shelter went bust because of adverse IRS action and over-expansion of the firm); *Collins v. Adams Dairy Co.*, 661 S.W.2d 603 (Mo. Ct. App. 1984) (remanding to allow defendant to show that plaintiff's store would have been a losing venture in a case in which defendant misrepresented that competing store planned to close).

22. *See, e.g., Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817 (10th Cir. 1986). There are stylized terms to describe the extent of an auditor's liability. *First Nat'l Bank of Bluefield v. Crawford*, 386 S.E.2d 310 (W. Va. 1989). *Bluefield* distinguishes a "review" from a "full audit." *See* 386 S.E.2d at 315. An audit may or may not be certified. The scope of an audit may be limited. For further authority and explanation see Mark P. Gergen, *Contracting Out of Liability for Deceit, Inadvertent Misrepresentation, and Negligent Misstatement*, in *EXPLORING CONTRACT LAW* 237, 260–65 (Jason W. Neyers et al. eds., 2009).

duty of care to other drivers by placing a sign on his car declaring he should not be relied upon to drive carefully. Further, the law of negligent misrepresentation determines the effect of a disclaimer or exculpatory term much as it is determined in contract law, by asking whether a plaintiff reasonably should have understood that his reliance was not invited or that the defendant had absolved himself of legal liability.

The concept of invited reliance and contract ways of thinking crop up in some nooks and crannies in the law of negligent misrepresentation where one may least expect them. Some examples are cases in which a defendant's negligent advice renders a plaintiff vulnerable to a tort committed by an agent of the plaintiff, as when an auditor negligently fails to detect theft by an employee, exposing the employer to further loss. Under modern principles of negligence law a plaintiff's recovery generally will be reduced to reflect the share of fault borne by a plaintiff or by a plaintiff's employee.²³ There is a small exception to this rule to cover unusual cases in which a defendant agrees to protect a plaintiff from the specific conduct in question.²⁴ In the law of negligent misrepresentation (and the law of economic negligence more generally) this result is the rule and not the exception. This is because the existence of duty and liability generally depend on a communicated undertaking to protect a plaintiff from an employee's conduct. An undertaking of this kind will preclude apportioning responsibility to the employee.²⁵ Note that in this situation contract ways of thinking expand liability rather than constrict liability, as is more typical.

23. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 5 (2000) (imputing the negligence of another person to a plaintiff "whenever the negligence of the other person would have been imputed had the plaintiff been a defendant"). Section 7 considers imputed responsibility. *Id.* § 7.

24. The paradigmatic case that the exception covers is when a plaintiff negligently injures himself and the doctor exacerbates the injury. The doctor may not diminish his liability on the ground that the plaintiff bore some responsibility. *See id.* § 7 cmt. m.

25. This principle is at the heart of the audit interference doctrine, which provides that an auditor may not reduce its liability for a client's negligence unless the negligence interferes with the auditor's ability to perform the audit. This absolves a client from responsibility for negligence that enables defalcations an auditor negligently fails to prevent. *See Steiner Corp. v. Johnson & Higgins of Cal.*, 135 F.3d 684 (10th Cir. 1998) (applying Utah law); *Bd. of Trs. v. Coopers & Lybrand*, 803 N.E.2d 460 (Ill. 2003); *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300 (Neb. 1984); *Collins v. Esserman & Pelter*, 681 N.Y.S.2d 399 (App. Div. 1998); *Stroud v. Arthur Andersen & Co.*, 37 P.3d 783 (Okla. 2001). *But see Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905 (Minn. 1990) (abolishing the doctrine while preserving the underlying principle). The doctrine usually is associated with *National Surety Corp. v. Lybrand*, 9 N.Y.S.2d 554, 563 (App. Div. 1939), which justified the rule by analogy to the situation "of a workman injured by a dangerous condition which he has been employed to rectify." The result in *National Surety* might stand under the invited reliance principle advocated in this Article. The auditors expressly undertook to verify cash balances. Had they done so, rather than relying on the books, the employee's pilfering of petty cash would have been revealed as he disguised it by kiting checks to create artificial cash balances at the time of audits. *See id.* at 558–61. The auditors argued the employer was negligent in not noticing the discrepancies between the deposits actually made and those recorded the books, but only a verification of the sums actually on deposit would have revealed the employee's scheme. The client would not be negligent in not verifying sums actually on deposit if it relied on the auditor's undertaking to do so.

Treating negligent misrepresentation as a problem of contract law also helps to untangle some knotty doctrinal legal problems. Courts have struggled to formulate a coherent basis for barring tort claims for a defendant's misstatement regarding the existence or terms of an existing or prospective contract between the defendant and the plaintiff. Some of the rules courts have devised to this end are quite crude and cause havoc when applied to other ends.²⁶ Other rules are better tailored but remain over- and underinclusive.²⁷ New York law bizarrely permits a plaintiff to recover for a misrepresentation regarding a contract by pleading and establishing negligence when rules of contract law, such as the parol evidence rule or the statute of frauds, would

26. The worst of the lot is the view that the economic loss rule bars any form of a negligence action between the parties to the contract when the claim relates to the contract's subject matter. *See* *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604 (3d Cir. 1995) (applying Pennsylvania law); *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477 (9th Cir. 1995) (applying Arizona law); *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995) (applying Florida law, although the Florida Supreme Court later repudiated this version of the economic loss rule); *Bailey Farms, Inc. v. NOR-AM Chem. Co.*, 27 F.3d 188 (6th Cir. 1994) (applying Michigan law); *Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70 (D. Mass. 1998) (limiting the rule to sales of goods); *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992).

The rule that a duty of care is owed only when an actor supplies a claimant with information to guide the claimant in a business transaction with another is less crude but still too clumsy. *See* *Nat'l Can Corp. v. Whittaker Corp.*, 505 F. Supp. 147 (N.D. Ill. 1981) (applying Illinois law). The rule that a duty of care is owed only when an actor is in the business of supplying the information is similarly less crude yet too clumsy. *Alderson v. Rockwell Int'l Corp.*, 561 N.W.2d 34 (Iowa 1997).

27. One such rule precludes negligence liability that is inconsistent with a valid disclaimer, merger provision, or other express term. *Hodgkins v. New England Tel. Co.*, 82 F.3d 1226 (1st Cir. 1996) (applying Maine law); *Vt. Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272 (2d Cir. 1996) (applying Vermont law); *Lowe v. AmeriGas, Inc.*, 52 F. Supp. 2d 349 (D. Conn. 1999), *aff'd*, 208 F.3d 203 (2d Cir. 2000) (applying Connecticut law); *Brogan v. Mitchell Int'l, Inc.*, 692 N.E.2d 276 (Ill. 1998); *Stanley v. Miro*, 540 A.2d 1123 (Me. 1988); *Sound Techniques, Inc. v. Hoffman*, 737 N.E.2d 920 (Mass. App. Ct. 2000); *Rio Grande Jewelers v. Data Gen. Corp.*, 689 P.2d 1269 (N.M. 1984); *Snyder v. Lovercheck*, 992 P.2d 1079 (Wyo. 1999). While the rule is good as far as it goes, it leaves open the door to a claim for a misstatement regarding a matter on which an agreement is silent, such as negligent assurances touching on job security made to an employee who is presumptively at-will. *Cf.* *Robinson v. Tripco Inv., Inc.*, 21 P.3d 219 (Utah Ct. App. 2000) (holding merger doctrine precludes a claim for negligent misstatement).

Another rule precludes negligence liability for a misstatement of opinion or a misstatement regarding a future event. *See* *Rodowicz v. Mass. Mut. Life Ins. Co.*, 279 F.3d 36 (1st Cir. 2002) (involving a failure to advise employee considering retirement about pending plan to offer more generous benefits as a retirement incentive); *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621 (7th Cir. 1993) (applying Wisconsin law and considering statements to an inventor of plans to market invention); *Jordan-Milton Mach., Inc. v. F/V Teresa Marie II*, 978 F.2d 32 (1st Cir. 1992) (involving a statement that the manufacturer would provide financing); *Zhu v. Countrywide Realty Co.*, 165 F. Supp. 2d 1181 (D. Kan. 2001) (applying Kansas law); *Valley Reg'l Med. Ctr. v. Wright*, 276 F. Supp. 2d 638 (S.D. Tex. 2001) (applying Texas law); *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374 (Alaska 1984) (rejecting claim by temporary pilot for misstatement that position was permanent); *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1166 (Kan. 2000) (precluding a negligence claim based on a statement that the firm "treated its people well"); *McMillion v. Dryvit Sys., Inc.*, 552 S.E.2d 364 (Va. 2001) (involving a manufacturer's statements regarding qualities of product). The rule cannot be extended outside the contractual setting because, in other settings, a misstatement of opinion or prediction is actionable. Additionally, the rule is too narrow in the contractual setting because it permits a negligent misrepresentation claim based on an oral warranty.

preclude a claim based on a representation.²⁸ While there is a case for loosening formal rules in contract that shield a party from responsibility for representations regarding a contract upon which the other party justifiably relies, it is difficult to make a case for conditioning this upon a speaker's negligence in making a representation.²⁹ Bringing negligent misrepresentation into contract solves these problems by making it clear that rules of contract law determine when a misrepresentation regarding a contract is actionable.

I hope this persuades you that negligent misrepresentation could and perhaps should be understood as a problem of contract law. This raises the question why negligent misrepresentation came to be treated as a tort almost everywhere in the common law world. I turn to this question now.

II.

THE HISTORY OF NEGLIGENT MISREPRESENTATION

A. *Glanzer v. Shepard: A Contract in All but Name*

The history of the tort of negligent misrepresentation begins in 1922 with a case involving a mistake in weighing beans.³⁰ As a result of the mistake, Glanzer Bros. overpaid \$1,261.26 for beans it purchased from Bech.³¹ Apparently, Glanzer Bros.' contract with Bech did not allow it to recover the overpayment from Bech.³² This would explain why Glanzer Bros. sued Shepard, the bean weigher hired by Bech and the person responsible for the mistake.³³ The trial court directed a verdict for Glanzer Bros. on the theory that it was a third party beneficiary of Bech's contract with Shepard.³⁴ The

28. New York has a strong form of the parol evidence rule but allows parties to get around the rule to recover on a representation made in negotiations that otherwise would not be actionable on a negligent misrepresentation claim if there is the requisite "special relationship." See, e.g., *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 776 N.Y.S.2d 301 (App. Div. 2004) (involving assurances by provider of software regarding its capacity); *Fleet Bank v. Pine Knoll Corp.*, 736 N.Y.S.2d 737 (App. Div. 2002) (discussing whether assurances by agent of lender that additional financing would be approved constituted a special relationship); *Grammer v. Turits*, 706 N.Y.S.2d 453 (App. Div. 2000) (involving a broker who did not disclose construction on property adjacent to one-month vacation sublease); *CooperVision, Inc. v. Intek Integration Techs., Inc.*, 794 N.Y.S.2d 812 (Sup. Ct. 2005) (involving a software license and service agreement).

29. See Gergen, *supra* note 22, at 259–60.

30. When Francis Bohlen presented a draft section on negligent misrepresentation for the Restatement of Torts in 1935, he prefaced his explanatory notes, "This Section is intended to express what the Reporter believed to be the law in New York as exhibited by the line of cases beginning with *Glanzer v. Shepard* and ending with the *Ultramares Corp. v. Touche*." See RESTATEMENT OF TORTS §§ 633–36 (Preliminary Draft No. 79, 1935).

31. *Glanzer v. Shepard*, 135 N.E. 275, 278 (N.Y. 1922).

32. Victor Goldberg argues that the absence of a restitution claim is an aspect of a larger understanding that weights were "final and binding" on all concerned, which would imply that neither party would have a claim against the weigher that required challenging the accuracy of a weight. VICTOR GOLDBERG, *FRAMING CONTRACT LAW 250* (2006).

33. *Glanzer*, 135 N.E. at 238.

34. *Id.*

Appellate Term reversed,³⁵ but the Appellate Division reinstated the decision on the authority of *MacPherson v. Buick Motor Co.*³⁶ With a short opinion by Justice Cardozo, the New York Court of Appeals, the preeminent common law court of its time and one of the great common law courts in history, affirmed the Appellate Division, but on a different ground.³⁷

Legal theorists of the day appreciated that this was no ordinary opinion even for Cardozo. In an article published in 1939—on the occasion of Cardozo’s death—Warren Seavey observes Cardozo used “every dialectic weapon which could be brought to bear”³⁸ to move the law forward in *Glanzer v. Shepard*. As Seavey tells it, Cardozo persuaded by cataloging “diverse situations in which recovery had been allowed.”³⁹ The brilliance of this strategy, according to Seavey, is that it “makes clear the fundamental principle and the futility of widely diverse rules for situations essentially similar.”⁴⁰

Cardozo never states the fundamental principle in *Glanzer*.⁴¹ I believe this is not because he thought the principle clear, but rather because the principle is hard to put in simple words. The closest Cardozo comes to stating a principle is in a passage describing the bean weigher’s conduct as “the deliberate certificate, indisputably an ‘act in the law’ . . . intended to sway conduct.”⁴² As you shall see, “act in the law” is a cryptic reference to the equation of contract with private legislation, the key feature of classical theories of contract. The rest of the opinion is a list of cases—including gratuitous bailment, public calling, gratuitous agency, implied agency, and third party beneficiary—that on the surface are united only by being on the border of contract law at the time.⁴³ As for what to name this family of cases and the theory of obligation, Cardozo is delphic: “We state the defendants’ obligation, therefore, in terms, not of contract merely, but of duty. Other forms of statement are possible. They involve, at most, a change of emphasis.”⁴⁴ Cardozo goes on to say that he could

35. *Glanzer v. Shepard*, 182 N.Y.S. 178 (App. Div. 1920).

36. *Glanzer v. Shepard*, 186 N.Y.S. 88 (App. Div. 1921) (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

37. *Glanzer*, 135 N.E. at 275.

38. Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 43 (1939).

39. *Id.* at 44.

40. *Id.*

41. I believe Seavey is referring to a principle he states in Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 76 (1942) (“A person has a duty, normally a duty of care, to protect from harm others who, because of a relation into which he has voluntarily entered, are dependent upon him.”). Later in the same essay, Seavey states that the duty not to create an undue risk of harm to others does not apply to pecuniary harm. He adds, “The liability for negligent, or even nonnegligent, statements made in the course of contractual dealings is in substance a contractual or quasi-contractual liability.” *Id.* at 87.

42. *Glanzer*, 135 N.E. at 276.

43. *Id.* at 276–77.

44. *Id.* at 277.

“stress the element of contract” or he could treat Shepard as Glanzer’s agent.⁴⁵ But he chooses not to. “These other methods of approach arrive at the same goal, though the paths may seem at times to be artificial or circuitous. We have preferred to reach the goal more simply.”⁴⁶

Cardozo’s next foray into what came to be known as negligent misrepresentation confirms that he understood the duty he found in *Glanzer v. Shepard* to be close to contractual. In *Ultramares Corp. v. Touche*, a lender who lost a substantial sum of money relying on inaccurate certified accounts sued the auditor claiming both negligence and deceit.⁴⁷ In rejecting the negligence claim, Cardozo argues that the case is unlike *Glanzer* because

[n]o one would be likely to urge there was a contractual relation, or even one approaching it, at the root of any duty that was owing from the defendants now before us to the indeterminate class of persons who, presently or in the future, might deal with the Stern Company in reliance on the audit.⁴⁸

Why in *Glanzer v. Shepard* does Cardozo choose not to rest the decision on contract, as did the trial court and the appellate division? Why did the route he selected—unclassified “duty”—seem to him simpler and less “artificial or circuitous”? Part II.B answers this question by showing how the constrictive character of the then-dominant theories of contract tended to exclude the conduct at issue in *Glanzer v. Shepard* from the ambit of contract. Part II.C explains why the tort came to be characterized as a matter of misrepresentation rather than simply negligence. In short, characterizing the tort as one of misrepresentation was necessary to preserve the essential contractual characteristics of the claim without describing the claim as contractual.

B. Classical Theories of Contract Construct the Field

1. Llewellyn and Beale

A 1931 essay by Karl Llewellyn, *What Price Contract?*, explains why Cardozo found it expedient not to ground the principle of *Glanzer* in contract. Llewellyn observes that the then-dominant theory of contract caused categories

45. *Id.*

46. *Id.*

47. 174 N.E. 441 (N.Y. 1931). In the same vein is Cardozo’s brief reference in *The Growth of the Law* to the liability as being on “the borderland between contract and tort.” BENJAMIN N. CARDOZO, *THE GROWTH IN THE LAW* 78 (1924).

48. *Ultramares*, 174 N.E. at 446. This passage in *Ultramares* is little remembered. What is remembered is a different passage in which Cardozo argues against negligence liability on the ground that it would be indeterminate. *Id.* at 444 (“If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.”).

of obligation once thought of as contractual to “drop quietly out of contemplation, unnoticed, unmissed, unmourned—and unaccounted for.”⁴⁹ The family of cases Cardozo cites in *Glanzer* appears at the end of Llewellyn’s long list of casualties—“gratuitous undertakings cognizable in tort or recognized as agencies.”⁵⁰

Llewellyn’s clever title equates “contract” with an idea of the field we now associate with classical theories of contract.⁵¹ The idea appears in the Restatement’s general definition of contract as “a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”⁵² John Salmond identifies a key feature of classical theories when he observes that “[t]he essential form of a contract is . . . I agree with you that henceforth you shall have a legal right to demand and receive this from me.”⁵³ Lon Fuller describes this key feature more succinctly when he observes that classical theorists conceived of contract as private legislation.⁵⁴

Llewellyn’s reference to “gratuitous undertakings cognizable in tort or recognized as agencies” probably is an allusion to an 1891 article by Joseph Beale entitled *Gratuitous Undertakings*.⁵⁵ The title is misleading for the article’s focus is really a group of cases in which a plaintiff entrusts his person, property, or money to the defendant. While a few of Beale’s cases involve a truly gratuitous undertaking by a defendant and pure economic loss,⁵⁶ Beale’s family of cases is broader than this. In many cases the defendant is a professional, a tradesman, an innkeeper, or a common carrier.⁵⁷ In some, the plaintiff is an intended beneficiary of the defendant’s contract with a third person, such as the plaintiff’s employer.⁵⁸

49. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 705 (1931).

50. *Id.*

51. I use the plural for, as you shall see, there is no canonical form of the theory.

52. RESTATEMENT (SECOND) OF CONTRACTS §1 (1981).

53. JOHN W. SALMOND, JURISPRUDENCE OR THE THEORY OF THE LAW 380 (1903).

54. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941). Fuller grounds contract law on “the principle of private autonomy,” which postulates that “private individuals [possess] a power to effect, within certain limits, changes in their legal relations.” *Id.*

55. Joseph Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222 (1891).

56. *See, e.g., Whitehead v. Greetham*, (1825) 130 Eng. Rep. 385; 2 Bing. 464 (a claim in assumpsit alleging the plaintiff gave 700 pounds to the defendant to purchase a secure annuity and that the defendant failed in this undertaking by purchasing an annuity from a Reverend Locke, who was insolvent).

57. Beale, *supra* note 55, at 222–26.

58. Beale’s family of cases differs from Cardozo’s in one striking respect—in many cases, the defendant’s negligence results in bodily harm to the plaintiff or physical harm to the plaintiff’s property. Few of Cardozo’s cases involve physical harm. I expect Cardozo omitted cases involving physical harm because he thought they would bring a negligence claim to mind. Cardozo did refer to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), prefacing it with a “*Cf.*” cite. *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922).

Beale argues it is useful to create a category of obligation between contract and tort to cover this odd family of cases:

A contract is a right which A has (*in personam*) against B, because B has consented, for a consideration, or in some formal manner, to assume the correlative duty. A tort is a violation of a right which A has (*in rem*) against B, equally with all others, because society has decreed that the corresponding duty should be laid upon every member of it. Between these classes of rights exists a third; which unlike a tort, depends upon some voluntary act by B, by which he undertakes a duty, and, unlike a contract, does not depend upon any promise of B, but only upon the mutual relations of A and B. In other words, B assumes a duty merely by entering into a new relation towards A.⁵⁹

Beale's third category of obligation is similar to contract in that it involves a voluntarily undertaken duty. But he creates a category distinct from contract, because, for him and his contemporaries, the mere fact that a relationship involves a voluntary undertaking is not enough to treat the case as a problem of contract. It is not the gratuitousness of the obligation—or the absence of bargained-for consideration—that leads Beale to exclude these relationships from the ambit of contract. As Beale himself observes, often in these cases a plaintiff has paid the defendant.⁶⁰

So what is it exactly that makes Beale reluctant to group this species of voluntary undertaking with the law of contract? The passage quoted above provides two clues. The penultimate sentence says that what is missing is “a promise of B.”⁶¹ The first sentence says that what is missing is a formal expression of consent to undertake a legal duty (confer a “right . . . in personam”).⁶² Beale does not describe the liability for carelessness in performing an undertaking as contractual because there is no expression of intent to undertake a forward-looking legal duty. This is the heart of the classical conception of contract, which Beale accepts unquestioningly. Perhaps this is unsurprising, for he wrote in the early 1890s, in the heyday of classical theories.⁶³ But classical theories were younger than Beale, who was born in 1861. The idea of contract we associate with classical theories does not appear in English language treatises until the late 1860s and mid-1870s. Prior to this time, Beale's third category of cases was routinely treated as a species of contract, which was loosely defined. The Section that follows examines this history.

59. Beale, *supra* note 55, at 222.

60. *Id.* at 222–23, 231.

61. *Id.* at 222.

62. *Id.*

63. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979). Atiyah describes the years 1770 to 1870 as “The Age of Freedom of Contract,” meaning the period of the ascendancy of the view of contract as a generic form of obligation created by a joint act of will, ideally by a true and expressed intention to undertake a legal obligation. *Id.* at 217.

2. *Invited Reliance as the Root Form of Assumpsit*

Common lawyers did not write about contract as a generic category of obligation until the late eighteenth and early nineteenth centuries. As late as 1800, if a lawyer botched your case,⁶⁴ a carrier damaged your goods, or a farrier bungled in shoeing your horse, you would not bring an action for professional malpractice, negligence, or breach of contract in an English or American court. You would bring an action either for assumpsit or for trespass on the case.⁶⁵ In the following history of assumpsit, I show that, before the emergence of contract as a distinct category of obligation, the action of assumpsit included many claims based upon carelessly performed informal undertakings (liability for negligent misstatement resulting in pure economic loss came later). In fact, Beale himself looked to the “ancient” history of assumpsit to find a “technical name” for his third category of obligation.⁶⁶ Further, principles closely related to the concept of invited reliance permeated the law of assumpsit. For Beale, “assumpsit” incorporated the idea of an undertaking and indeed, it literally means “he undertook.”⁶⁷

This use of the term assumpsit goes back at least to the fourteenth century, when it encompassed the action for trespass on the case to recover for misperformance of informal contracts.⁶⁸ The nominally contractual actions of debt and covenant did not cover such claims, unless the claimant had the foresight to obtain a conditional bond securing the defendant’s performance or the foresight to embody the service agreement in a document under seal.⁶⁹ Nor did such claims easily fit trespass, which nominally required pleading a forcible wrongdoing.⁷⁰ These claims could, however, be brought in trespass on the case

64. *Pitt v. Yalden* (1767) 98 Eng. Rep. 74 (C.P.); 4 Burr. 2060, is said to be the first reported malpractice claim against an attorney. The report does not indicate the form of the pleading. The claim alleged that the plaintiff’s attorney negligently failed to file a required declaration, causing a debt owed to the plaintiff to go unpaid when the debtor was released from custody after two terms.

65. The summary of the argument of plaintiff’s counsel in *Thorne v. Deas*, 4 Johns 84 (N.Y. Sup. Ct. 1809), shows the intertwining of assumpsit and the action on the case, connecting the latter to tort and the former to contract and consideration:

But in an action on the case, in the nature of a *tort*, for a *nonfeasance*, or a *misfeasance*, it is not requisite to show any consideration. The action is for the damages sustained in consequence of the *nonfeasance*, and not on the ground of the *assumpsit*. If the undertaking be *gratuitous*, and a special damage is caused by the failure of the party to perform the undertaking, an action will lie.

Id. at 85. The case famously holds that an action on the case lies only for misfeasance and that no action lies on the case or in assumpsit for nonperformance of a gratuitous promise, accepting defense counsel’s argument that there is no legal obligation in a gratuitous promise. *Id.* at 96–97.

66. Beale, *supra* note 55, at 223.

67. *Id.*

68. See DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 126 (1999).

69. *Id.* at 30–38.

70. The division between trespass and trespass on the case is murky. Trespass nominally required pleading physical harm to the claimant’s person or property inflicted by force of arms. But claimants were allowed to recover in trespass for some accidental and inadvertent harms, such as on a

because a trespass on the case action did not require specifying causative events. A trespass on the case claim had two basic parts. Quite opposite from modern pleadings, it reserved the defendant's harmful conduct for the second part. The preceding first part was a "whereas" clause that explained why the harmful conduct should be actionable. This form of pleading enabled a lawyer to press a novel claim for which there was no formulaic pleading by telling the client's story in the whereas clause. Among the grounds for imposing liability for harmful conduct was that a defendant had undertaken or assumed an obligation to care for the claimant's person, property, or money.⁷¹ In a word: *assumpsit*.

The voluntary assumption of obligation as a ground for liability shows up in the stories told in the "whereas" clauses in the early pleadings of trespass on the case. Many involve a plaintiff accepting a defendant's invitation to entrust the plaintiff's body, property, or money to the defendant's control or custody. A.W.B. Simpson translates one of the earliest reported cases, involving a claim against a ferryman for the loss of a mare attributed to the ferry being overloaded, as alleging "the ferryman . . . received the mare to carry it safely."⁷² In another early case, in which the plaintiff William alleged that the surgeon John negligently treated his ill horse, Simpson translates the pleadings as "the aforesaid John took in hand and made himself responsible for the said

claim that the defendant's dog bit the claimant's sheep or a claim that the defendant's cattle trampled the claimant's crop. J.H. Baker, *Trespass, Case, and the Common Law of Negligence 1500-1700*, in *NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS* 47, 50-53, 59-60 (Eltjo J. H. Schrage ed., 2001). Baker surmises from the absence of pleadings on the case involving road accidents and the ilk that such claims were allowed in trespass. *Id.* at 68-69. D.J. Ibbetson speculates that, while trespass could be and was stretched quite far, trespass on the case was likely the preferred writ, at least for the types of claims for which records show the writ was used. The preference for the writ of trespass on the case likely owed to two advantages. The first advantage was that the writ could cover cases in which it was implausible to claim the defendant used force against the claimant's person or property, such as a seller tampering with goods. The second was that the formal pleading of trespass risked confusing members of the jury, who were summoned by the sheriff and told the nature of the claim so that they could make inquiries before the hearing. IBBETSON, *supra* note 68, at 48-51.

71. Peter Birks observes that claimants filled in the "whereas" clause of the pleading in trespass on the case in three ways. The type described in the text became identified with *assumpsit*. "The second type alleges a common custom of the realm requiring care The third type recites neither an undertaking nor a custom but simply states the factual background and assumes that faulty conduct recited in the main sentence will attract liability." Peter Birks, *Negligence in Eighteenth Century Common Law*, in *NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS*, *supra* note 70, at 173, 187.

For the history of the separation of trespass and trespass on the case, see IBBETSON, *supra* note 68, at 43-57. Ibbetson observes that in the middle part of the fourteenth century, claimants had mixed success with fact-specific pleadings of trespass in cases in which the facts plead made it clear that the wrong complained of did not involve force or breach of the King's peace but which nonetheless included these formulaic elements. The division between trespass and trespass on the case occurred in the latter part of the fourteenth century when fact-specific pleadings omitted the formulaic elements and courts began to treat such pleadings as a distinct form of action. *Id.*

72. A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 211 (1975).

William's horse."⁷³ Later, when it became the practice to plead *assumpsit* without telling the backstory, Simpson infers that the term probably was used "to suggest the idea that the defendant had made himself responsible in a particular way, viz. by taking something (or some person) into his custody or control."⁷⁴ One way to describe the gist of the conduct creating a duty is to refer to the idea of an entrustment. The physical entrustment by a plaintiff of his body, property, or money to a defendant's hand, at the defendant's invitation, is a particularly manifest form of invited reliance.

Over several centuries, the term *assumpsit* came to be detached from the simple idea of an assumption of responsibility. The action of *assumpsit* came to be used as a basis for recovering damages in a variety of situations that encompass much of the modern law of contract as well as the modern law of restitution and unjust enrichment. For instance, *assumpsit* was used to recover damages for breach of formal agreements, unpaid debts, nonpayment for services rendered or goods supplied under an informal agreement, money mistakenly paid, and more.⁷⁵ Many of these uses became formulaic pleadings in their own right, appropriately called the common counts. Most of these forms of pleading asserted a breach of a promise (in the second clause, stating the harmful conduct) that was supported by consideration (in the *whereas* clause).⁷⁶

At some point, English lawyers began to organize these materials into a body of contract law they considered distinct from the forms of action. No doubt this occurred gradually.⁷⁷ By the eighteenth century, the earliest written accounts of contract as a category of obligation had begun to appear. These accounts treated contract as an open-ended category that includes Beale's cases and more. Blackstone's Commentaries included the cases in a category of implied contract, which he juxtaposed with express contract, and which he placed alongside implied contracts to pay for services, goods, or money

73. *Id.* at 212.

74. *Id.* at 217.

75. IBBETSON, *supra* note 68, at 147–51, 269–73.

76. Birks reports the formula was as follows: "why, whereas <in consideration that . . .> the defendant undertook to . . . , nevertheless he <wickedly broke his promise>, to the plaintiff's damage." Peter Birks, *supra* note 71, at 217.

77. IBBETSON, *supra* note 68, at 215 (concluding that "by 1800 the law of contract could be treated as an abstract entity distinct from the forms of action"). Ibbetson argues that by the eighteenth century it was commonplace to think of contract as a reified obligation willed into existence by the parties by agreement or a reciprocated promise. This seems a bit early. Ibbetson cites the *Treatise of Equity* (1737) attributed to Henry Ballow as incorporating a theory of contract that grounded contract on promise as an expression of will. *Id.* at 217–19. The treatise does discuss what constitutes an effective act of will or reason at great length but does not present a theory of contract as promise. Ballow's conception of "contract" is sufficiently unformulated that he still defines involuntary obligations as a species of contract. HENRY BALLOW, 1 *TREATISE OF EQUITY* 4 (1737). Ballow puts involuntary "contracts" to the side and examines only the conditions for an effective act of will in a voluntary contract, which he seems to define as an act resulting in the "translation of property . . . whether it be a sale, or a loan, or a free gift, or any other sort of contract." *Id.*

received, and to hold money received on behalf of another. All of this is in the materials on property, suggesting Blackstone thought the most important use of contract was to transfer property. Blackstone described the obligation in an informal undertaking as “implied by reason and construction of law” on the principle “that everyone who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill.”⁷⁸

The early American and English contract treatises, which first appear early in the nineteenth century, largely followed Blackstone in how they defined and organized the field.⁷⁹ It is difficult to find in these treatises anything that resembles a general theory of contract.⁸⁰ Parsons’s treatise (1857)

78. 3 WILLIAM BLACKSTONE, COMMENTARIES *163. When Blackstone refers to a duty implied in law, he is referring to “the general undertaking” of an actor in a profession or business of caring for others to conform to the standards of the profession or business. *Id.* at *164. For a person “whose common profession and business it is not, the law implies no such *general* undertaking; but in order to charge him with damages, a special agreement is required.” *Id.*

79. In his overview of the field, Comyn lifts his description of the category of implied contract directly from Blackstone, giving him due credit for his formulation. SAMUEL COMYN, 1 A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL 6. (1807). Comyn adds a lengthy discussion of the hoary question whether an action will lie for nonfeasance in a gratuitous undertaking. SAMUEL COMYN, 2 A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS NOT UNDER SEAL 367 (1819). Addison illustrates the category with numerous specific instances, some involving gratuitous undertakings (e.g., bailment), others involving implied terms in compensated undertakings (e.g., the obligation of a person in a profession, trade, or craft to perform up to the standards of their occupation), and some involving obligations that are quite far afield (e.g., obligations attendant to marriage). C.G. ADDISON, TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU 210–12 (1847). Metcalf places alongside express contracts “[a]n implied contract . . . inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice; to compel the performance of a legal and moral duty.” THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS 4 (1867). He follows this with a list similar to Blackstone’s. *Id.* at 4–5. Bailment is invariably among the contracts covered and, as such, treatises of the day recognize the attendant possibility of liability for negligence in performing an informal or gratuitous undertaking. *See also* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 142–55 (1841); WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 252–300 (1844).

80. For example, Hilliard, writing in 1872, simply defines contract as agreement without explaining the constitutive elements of agreement. 1 FRANCIS HILLIARD, THE LAW OF CONTRACTS 2–3 (1872). The working part of the treatise is in the analysis of specific types of contracts. Among these is bailment, which Hilliard defines as a contract based on trust, the breach of which give rise to an action in contract or tort. 2 FRANCIS HILLIARD, THE LAW OF CONTRACTS 288–89 (1872).

Joseph Story characterizes the liability for misfeasance by a gratuitous bailee as contractual. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 5–6, 101 (1832). He concedes the artificiality of distinguishing misfeasance and nonfeasance in a gratuitous bailment (using the civilian concept of “mandate”) but justifies the distinction as a by-product of the accepted view that a gratuitous promise is not legally binding. In the second edition of the treatise, Story adds an extended response to an argument that a mandate and a deposit could not be a contract because there is no consideration. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 5 n.2 (2d ed. 1840). The gist of his response is that contract includes “contract, engagement, undertaking, or promise . . . capable of being enforced by law” and that a mandate is within this family of obligations once performance is undertaken. *Id.*

was atypical in that it had a brief sketch of a recognizable theory.⁸¹ After noting that some “contracts are deliberately expressed with all the precision of law,” Parsons added: “[m]ore frequently” contracts are “simpler in form and more general” and “leave more to the intelligence, the justice, and honesty of the parties,” and “[f]ar more frequently they are not expressed at all; and for their definition and extent we must look to the common principles which all are supposed to understand and acknowledge.”⁸² This is similar to the modern concept of relational contract. Parsons’ first principle of contract construction is “to find in a contract a meaning which is honest, sensible, and just, without doing violence to the expressions of the parties.”⁸³ This is similar to the modern doctrine of reasonable expectations. Parsons questioned the significance of the element of consideration⁸⁴ and defined consideration expansively as any basis for enforcing a promise.⁸⁵ This includes consideration for an implied promise to use “due care and diligence” in a gratuitous undertaking with the consideration being the claimant’s “trust and confidence.”⁸⁶ Parsons’s illustrative cases are liability for negligence by a gratuitous bailee and a gratuitous agent.⁸⁷

As I show in the next Section, Parsons’s relatively flexible and expansive general theory of contract soon gave way to much more rigidly formal classical theories. These theories led to the exclusion of cases involving, for instance, implied promises and gratuitous bailments from the field of contract, cases that Parsons’s theory of contract had easily accommodated not long before.

3. Pollock and the Rapid Success of Classical Theories

The first clear expression of a classical-type theory of contract appears in 1867, in a treatise by Stephen Martin Leake.⁸⁸ Critics have disparagingly

81. While Colebrooke’s treatise does not explicitly suggest a general theory of contract, he defines contract in similarly capacious terms, as a voluntary agreement between two or more persons that is an engagement to give, to do, or not to do. H. T. COLEBROOKE, *TREATISE ON OBLIGATIONS AND CONTRACTS* 2 (1818). This includes miscarriage in the performance of a gratuitous undertaking. *Id.* at 42. Like Parsons, he finds consideration in trust or delivery of a thing. *Id.* at 40. Metcalf defines contract as agreement, and includes obligations “inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice.” THERON METCALF, *PRINCIPLES OF THE LAW OF CONTRACTS AS APPLIED BY COURTS OF LAW* 4–5 (1867). He gives as an example the implied obligation to perform a task with reasonable care. *Id.*

82. THEOPHILUS PARSONS, *1 LAW OF CONTRACTS* 4 (3d ed. 1857).

83. *Id.* at 5.

84. *Id.* at 7.

85. *Id.* at 357.

86. *Id.* at 372–73.

87. *Id.* at 372 note d.

88. STEPHEN MARTIN LEAKE, *THE ELEMENTS OF THE LAW OF CONTRACTS* (1867). A century earlier, a French lawyer, Robert Joseph Pothier, published a treatise that defined contract in terms that anticipated key features of classical theories. Pothier’s treatise was published in France in 1761–1764. An English translation was published in America in 1802 and in England in 1806. ROBERT JOSEPH POTHIER, *A TREATISE ON OBLIGATIONS CONSIDERED IN MORAL AND LEGAL VIEW TRANSLATED FROM THE FRENCH OF POTHIER* (1802). Pothier defines contract as “the promises which we make,

compared the treatise to Frederick Pollock's later treatise from 1876, arguing that Leake's treatise appears to have been written for bench and bar and not for "students of principles and legal thinkers."⁸⁹ This is unfair to Leake. While his theory of contract may seem alien to American lawyers,⁹⁰ the problem with his theory is that it is too rigorous, not that it is under-theorized. Leake took his framework from civil law and John Austin's jurisprudence.⁹¹ He distinguished rights in personam and rights in rem, describing the former as part of the law of obligations. He then divided obligations into two categories: *ex contractu* and *ex delictu*.⁹² The latter arise from infringement of a preexisting right. The former do not. Rights *ex contractu* derive their force from being consensual and certain.⁹³ Leake followed this reasoning to the conclusion that breach of contract gives rise to a claim *ex delictu* because the right to damages is a secondary right. This conclusion is perfectly logical if, like Leake, you view contract as limited to consensual and certain obligations.⁹⁴ This contrasts sharply with Parsons' conception of contract as the law of obligations attendant to voluntary undertakings either by expression or by convention.⁹⁵

In emphasizing consent, Leake presaged classical theories' fetishization of contract as private legislation. Leake also foreshadowed the eventual exclusion from contract of categories of obligation once viewed as contractual: his formal conception of the field of contract left no room for Beale's third category of cases. Indeed, there is no room in Leake's theory of contract for much of what we think of as contract law today, including the rules on damages and the rules on contract construction.

Pollock's influential 1876 treatise conceived of the core or ideal case of contract much like Leake's, but provided a much more familiar account of the field. From the very beginning of the treatise, Pollock made it clear that his ambition was to develop a general theory of the field of contract. He began by lamenting that "that no such thing as a satisfactory definition of Contract is to

with an intention of engaging and binding ourselves and of conferring on the other party the right of requiring the performance of them." *Id.* at 4.

89. NEIL DUXBURY, *FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION* 189–90 (2004) (internal quotation marks omitted).

90. Legal theorists from elsewhere in the common law world are more comfortable with the idea that contract is about creating primary rights while claims for damages for breach of contract are in the nature of secondary rights that really belong in tort law. See SMITH, *supra* note 9, at 104; ROBERT STEVENS, *TORTS AND RIGHTS* 286 (2007).

91. John Austin is generally credited with establishing the study of analytical jurisprudence in England. H.L.A. Hart, *Introduction*, in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, at vii, xvi (1954).

92. LEAKE, *supra* note 88, at 3.

93. *Id.* at 4.

94. This anticipates Fuller's objection that the will theory cannot justify a general rule of expectation damages for breach of a contract because "[i]f a contract represents a kind of private law, it is a law which usually says nothing at all about what shall be done when it is violated." L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52, 58 (1936).

95. See *supra* Part II.B.2.

be found in any of our books.”⁹⁶ The definition Pollock developed soon became the conventional definition of a contract as a promise the law will enforce.⁹⁷ In what amounted to an exercise in stipulative definition, Pollock began by arguing that the scope of contract is narrower than the wider universe of consensual transactions and agreements.⁹⁸ To illustrate that not all consensual transactions are contractual, he cited the example of a gift.⁹⁹ In puzzling through the difference between contract and gift, Pollock cited the case of two people bargaining and observed that in common understanding the acceptance of a proposal or offer forms a contract. But the mere presence of offer and acceptance does not distinguish contract from gift, as Pollock went on to say, for a conveyance of property by gift involves the same sort of communication. A gift is not effective unless the donee accepts it. Pollock eventually located the difference in the forward-looking nature of contractual obligations, observing that “in the case of a contract something remains to be done by one or by each of the parties, which the other has or will have a right to call upon him to do.”¹⁰⁰ This led Pollock to settle on the familiar concept of contract as “an agreement which produces an obligation . . . [T]he common intention expressed by the parties has the peculiar character, that it contemplates a future performance or performances to which one or each of them is to be bound.”¹⁰¹ Passages like these make it clear that Pollock viewed contract as private legislation fairly strictly defined.¹⁰² A field so conceived had no space for Beale’s cases. They disappeared unnoticed.¹⁰³

96. FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* 1 (1876).

97. *Id.* at 5.

98. He defines agreement as, “When two or more persons concur in expressing a common intention so that rights or duties of those persons are thereby determined.” *Id.* at 2.

99. *Id.* at 3.

100. *Id.* at 6.

101. *Id.* In later editions, Pollock came around to incorporating consideration in the definition of contract, though he never embraced the bargain theory of consideration. See Frederick Pollock, *Afterthoughts on Consideration*, 17 L.Q. REV. 415 (1901). Pollock used the *Law Quarterly Review*, which he edited, to give his audience an advance look at his new materials on consideration. Pollock credits Ames at several points and disagrees with Holmes’s “ingenious attempt to make the *quid pro quo* of Debt cover the whole ground.” *Id.* at 419 n.2.

102. Neil Duxbury reads Pollock’s first edition as embracing a strong form of the will theory, which requires for a contract there be shared subjective assent or the proverbial meeting of the minds. DUXBURY, *supra* note 89, at 192–93, 197. Williston reads Pollock as going even further than this and requiring a shared intention to affect legal relations. 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* 21 (1920).

I think both may misread Pollock. It is fairly clear Pollock does not think much turns on the specific details of the abstract definition of contract. When Pollock describes a contract as a product of a true, shared subjective agreement between two people that one or each will be under an obligation to the other that the other may go to a court to enforce, it is clear he is thinking of the core or ideal case. The legal definition of contract Pollock builds around this abstract definition has a broader sweep. For example, Pollock concedes agreement is defined objectively in some circumstances. And objective criteria or markers determine if there is the requisite apparent intent that an agreement will have legal consequences. This is one function the doctrine of consideration serves. See POLLOCK, *supra* note 96, at 168. Pollock observes “[t]he main end and use of the doctrine of Consideration in our modern

Perhaps because Pollock's conception of contract caught the spirit of the times, his contract treatise exerted an enormous influence on his contemporaries. Contract treatises after Pollock's defined the field largely in his terms.¹⁰⁴ William Anson (1879) defined contract as an agreement between two or more persons with the intention to affect their legal relations.¹⁰⁵ The American Francis Wharton (1882) explicitly built on the work of the English treatise writers Pollock, Leake, and Anson, while commenting that English jurisprudence is more beholden to "free trade principles" than American jurisprudence.¹⁰⁶ Wharton followed civilian writers and the logic of the will theory to a conclusion not reached by Pollock. Wharton took the position that

law . . . is to furnish us with a reasonable and comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter." *Id.* Williston concurs, arguing the common law requirement of consideration (defined as bargained for benefit or detriment) obviates the need for a rule requiring an intent to form legal relations. WILLISTON, *supra*, at 21–22.

103. Pollock alludes in passing to bailment and other cases in Blackstone's category of implied contract in discussing whether express trusts might be included in contract as an exception to the general rule that a third party has no right under a contract. He concludes trusts are best kept apart from contract for definitional reasons: "The complex relations involved in a trust cannot be conveniently reduced to the ordinary elements of contract." POLLOCK, *supra* note 96, at 189.

The first edition of Pollock's 1887 torts treatise contains a brief discussion of Beale's cases, but only in the context of an uninteresting question, which is whether a plaintiff may have "[a]lternative forms of remedy on the same cause of action." FREDERICK POLLOCK, *THE LAW OF TORTS* 337 (1887). Pollock quite rightly dismisses this as a formal problem of little practical significance. In discussing the point, Pollock notes the possibility of grounding a duty on an "undertaking." Strikingly, he defines an "undertaking" that gives rise to a duty of care in broad terms that are similar to the modern negligence principle: "If a man will set about actions attendant with risk to others, the law casts on him the duty of care and competence." *Id.* at 338.

It is clear that Pollock does not consider this is an operative legal rule or principle. Given the inchoate state of negligence law at the time it would be remarkable if he did. This leaves Pollock at a bit of a loss to account for a case in which a plaintiff who detrimentally relies on an erroneous train time-table is allowed to recover damages on the ground either of contract or in tort for a "false representation." *Denton v. Great N. Ry. Co.*, (1856) 119 Eng. Rep. 701; 5 EL & BL. 860. Today this could well form the basis for a negligent misrepresentation claim. Pollock does not question the justice of the result in the case but he does remark "a doubtful tort and the breach of a doubtful contract were allowed to save one another from adequate criticism." POLLOCK, *THE LAW OF TORTS*, *supra*, at 343 note t.

Pollock addresses the case and similar cases that bind defendants to proposals to deal and offers made to the world at length in the fourth edition of his Contracts treatise. POLLOCK, *supra* note 96. The gist of Pollock's argument is that there is no space in contract for an "inchoate or unascertained obligation" or a "floating contract with [an] unascertained person." *Id.* at 19–20.

104. I am referring here only to new treatises. While I have not systematically reviewed later editions of old treatises my impression from the odd later editions I have looked at is that they are rarely revised to account for fundamental changes in thinking. Pollock's treatises are the exception. For example, Williston was the editor of the 8th edition of Parsons's treatise. The general principles and specific materials on contracts founded on trust and confidence are unchanged. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 463–64. (Samuel Williston ed., 8th ed. 1893).

105. WILLIAM R. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* (1879). This appears to follow Pollock. It even adds the gloss that contract is a promise and the gloss that contract is a species of obligation tying two people together. Anson also excludes trust from contract. *Id.* at 8. Nevertheless he categorizes a bailee's taking of property as a species of consideration and the implied obligation to care for the goods as contract. *Id.* at 70.

106. 1 FRANCIS WHARTON, *A COMMENTARY ON THE LAW OF CONTRACTS*, at vii (1882).

liability for loss stemming from reliance on a negligent misstatement of assent to contract is not actually contractual (there is no meeting of the minds), but rather is a species of negligence or deceit.¹⁰⁷ Williston, whose treatise of 1920 arrives much later, embraced Pollock's conception of contract, taking the position "[t]here can be a contract only so long as there is something yet to be done, or some duty [is] yet owed"¹⁰⁸

Early critics of classical theories of contract did not question the definition of the field.¹⁰⁹ In a 1917 article, Arthur Corbin defines contract "as the legal relations between persons arising from a voluntary expression of intention, and including at least one primary right *in personam*, actual or potential, with its corresponding duty."¹¹⁰ The goal is to identify the acts "which will cause society to come forward with its strong arm."¹¹¹ This conception of contract led Corbin to exclude from contract a barter exchange of goods as well as gift.¹¹² According to Corbin, a barter exchange by *A* of apples to *B* for money differed from a contract between *A* and *B* to exchange apples for money because, in the latter case, "[i]f *B* fails to keep his promise, society will at *A*'s request exercise compulsion against *B*, but will exercise compulsion against no other person."¹¹³ Corbin prefaced all of this with the caveat that he adopted this definition of contract in the interest of "clearness of thought" and because "[v]ery likely it would be most convenient generally"¹¹⁴

Similarly, classical theorists and the early critics of classical theories almost universally agreed that the cases in Beale's third category are not part of contract law. Beale was unusual in arguing that they are not part of tort law either.¹¹⁵ Many, like Pollock, did not mention the cases at all. Theorists who explained why the cases were excluded from contract disagreed on the reason.

107. 2 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF CONTRACTS 385–93 (1882).

108. Arthur L. Harding, *Williston's Fundamental Conceptions*, 3 MO. L. REV. 219, 225 (1938).

109. Similarly, George P. Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1919), after noting Williston's examples of an acceptance of a check sent in satisfaction of a claim and demanding a price adjustment in a cash purchase, observes that "[t]he last two instances, like cash sales, may not be cases of contract at all, possibly being satisfaction without accord or sale without contract and so having no juristic significance except as protests against lawlessness." *Id.* at 379.

110. Arthur Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 170 (1917).

111. *Id.*

112. *Id.* at 171–72.

113. *Id.* at 173.

114. *Id.* at 169–70.

115. Arthur Underhill is unusual in proposing a category of "quasi torts" to cover "negligence of professional men" and misfeasance in gratuitous undertakings. ARTHUR UNDERHILL, A SUMMARY OF THE LAW OF TORTS OR WRONGS INDEPENDENT OF CONTRACT 24–28 (1873). Underhill may have taken the label quasi-tort from Pothier. Pothier equates quasi-torts with wrongs done without fraud or malice "but through inexcusable imprudence" causing injury to another. POTHIER, *supra* note 88, at 73.

While none of the reasons offered is compelling by itself,¹¹⁶ taken together they clearly mark off Beale's cases from the canonical case of contract, making it difficult to describe the problem as contractual. Williston and Holmes rested their conclusion on the bargain theory of consideration, explaining that a plaintiff's entrusting his property, money, or person to a defendant is not consideration because there is no bargain.¹¹⁷ Corbin said the problem is that there is no promise from the defendant to the plaintiff to assist the plaintiff.¹¹⁸ Some theorists divided obligations between those that depend on consent and those that do not, and rejected the possibility of hybrid obligations that ground on a voluntary undertaking where the parties leave it to courts to fill in much of the content of the obligation. For example, John Innes Clark Hare said of the difference between bailment and contract:

The difference between such a trust and a contract properly so called is that the obligation of the latter depends on intention, and may be as much or as little as the parties please, while in the former it is implied by the law, which will not suffer it to be made less or greater than justice and good faith require.¹¹⁹

Perhaps Beale was motivated to propose a category of obligation intermediate to contract and tort to temper such silliness.

The hold of classical theories of contract was so strong that theorists of the late nineteenth and early twentieth century tended to push problems that do not conform to them outside of contract, to be dealt with by other bodies of

116. A promise to use due care can almost always be implied if reliance is invited. Classical theorists had no difficulty in implying a reciprocal promise by a beneficiary of an informal undertaking to pay reasonable compensation for a service rendered (absent an apparent understanding a service is rendered gratuitously). They describe this obligation as an implied-in-fact contract, often taking pains to distinguish it from an implied-in-law contract or a quasi contract. See WILLISTON, *supra* note 102, at 3–5.

Williston's view that a strict definition of contract requires bargained-for consideration did not prevail. Later scholars cite the gratuitous bailment and gratuitous agency cases as important antecedents for the doctrine of promissory estoppel. See Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: I*, 50 MICH. L. REV. 639, 665–74 (1952); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: II*, 50 MICH. L. REV. 873, 873–83 (1952).

Hare's attempt to divide obligations between those that depend entirely on actual or expressed consent and those imposed by law entirely independent of consent is a non-starter for many of the familiar reasons why the will theory of contract is implausible. For a good touchstone of this, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575–77 (1933).

117. 2 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* 1951 (1920). Williston equates the "idea of promissory estoppel" with tort. WILLISTON, *supra* note 102, at 192.

118. A.L. Corbin, Comment, *Consideration for Promises by a Gratuitous Bailee*, 32 YALE L.J. 609 (1923). The comment is on *Siegel v. Spear & Co.*, 234 N.Y. 479 (1923), which enforces a promise by a gratuitous bailee to obtain insurances for goods in his care, finding consideration in the entrustment of the goods. Corbin argues this obligation is contractual because it depends upon a promise. He contrasts the duties of a gratuitous bailee in the absence of a promise.

119. J.I. CLARK HARE, *THE LAW OF CONTRACTS* 129–30. Clark follows this to the logical and bizarre conclusion that "Accordingly, an unpaid agent or bailee can neither stipulate for immunity from gross negligence or misfeasance, nor be bound by an agreement to insure the property confided to his care." *Id.* at 130.

law. This was true of many problems we consider quite close to the core of contract. For example, Wharton took the position that the problem of mistaken apparent assent to a contract should be treated as part of the law of negligence, as a problem of deceit, or by importing the concept of *culpa in contrahendo*¹²⁰ from civil law.¹²¹

The generation of scholars who first broke away from classical theories, including Roscoe Pound, Clarke Whittier,¹²² and George Gardner, made similar arguments in less doctrinal terms.¹²³ Driving their arguments is a substantive view that it is unfair and unnecessary to fine an actor who makes an apparent but unintended promise if the accidental promise causes no harm. But even these critics of classical theories largely accepted the definition of the scope of the field of contract as being about the making, enforcement, and adjustment of future-regarding promises and agreements.¹²⁴ Nevertheless, in the 1930s and early 1940s, there began a cascade of internal and external challenges to classical theories of contract. The challenges went both to the theories' basic premises and to specific features of contract law that follow from these premises.

Glanzer v. Shepard was decided in 1921, just as the tide was turning against classical theories of contract. It is not surprising Cardozo declined to take the theories head-on. He may have thought, "Nothing is gained and much confusion is invited when we attempt to treat common-law relational duties in terms of willed undertakings." This was Pound's advice to the American Law

120. "Fault in negotiating." See Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 402 n.4 (1964).

121. WHARTON, *supra* note 107, at 385–93.

122. Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 441–42 (1929).

123. George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932). The article is rarely cited and, one expects, rarely read. The article is unearthed in Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94 (2000) (arguing that Gardner anticipates many of Fuller's points). The article is well worth the time spent on it. The key points for my purposes here are Gardner's identification of a "tort principle" of indemnifying a promisee's reliance loss, which he grounds on a "social duty" not to mislead and Gardner's principle limiting a plaintiff to such damages in a case of an apparent promise in which the mistaken promisor did not receive the agreed exchange. Gardner, *supra*, 22–25.

124. This feature of contract theory comes under systematic criticism only fairly late in the twentieth century by "relational contract theory" and by critical legal theory. See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000); Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992); and Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989). Feinman characterizes the dominant view of Contract as "neoclassical," ascribing to this view a set of key assumptions: (i) "the focus of the inquiry is on a relatively discrete promise, one that can be meaningfully analyzed as a distinct element of its setting"; and (ii) "the baseline condition of social and economic life is limited responsibility toward others." Feinman, *The Last Promissory Estoppel Article, supra*, at 308.

Institute Council three years later in a report on the classification of the law.¹²⁵ The Section that follows explains why Cardozo's unclassified duty in *Glanzer* came to be classified as a matter of misrepresentation.

C. Misrepresentation to Preserve the Contractual Feature of the Claim

In *Glanzer v. Shepard*, Cardozo took pains not to label the duty he found to be a matter of "tort" or "negligence."¹²⁶ But others quickly used these labels.¹²⁷ Almost anything may be called a tort, for tort law was then and still is an aggregation of conceptually distinct causes of action loosely systemized around the character of a defendant's conduct and of a plaintiff's injury.¹²⁸ *Glanzer* could be described as a negligence claim without undue difficulty. A negligence claim had three elements: an antecedent duty of care, breach, and harm.¹²⁹ Putting aside the question whether an antecedent duty of care may be congruent with a contract with a third party, *Glanzer* is unproblematic, for the defendant's contract clearly establishes a duty.¹³⁰ The instinct that negligence requires physical harm had not yet taken expression as a hard-and-fast rule precluding negligence liability for pure economic loss. This raises the question why American legal theorists of the period treated negligent dissemination of misleading information as a negligent misrepresentation problem rather than

125. ROSCOE POUND, PRELIMINARY REPORT TO THE COUNCIL ON CLASSIFICATION OF THE LAW 44 (1924). While the reference is to Trusts, I expect Pound would have made the same point, though perhaps less strongly, about Beale's cases. Both Pound and Cardozo expressed the view that contract was distinct in the value placed upon stability and certainty. CARDOZO, *supra* note 47, at 82, 111.

126. The comparison with *Ultramares* is striking, for Cardozo begins the *Ultramares* opinion by stating that "[t]he action is in tort for damages suffered through the misrepresentations of accountants, the first cause of action being for misrepresentations that were merely negligent." *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931).

127. Judge Andrews describes *Glanzer v. Shepard* as a negligence case in *International Products Co. v. Erie Railroad Co.*, 155 N.E. 662, 664 (N.Y. 1927) ("In [*Glanzer*] a like theory [of contract] was mentioned, but the recovery was placed on the ground of negligence."). *Mulroy v. Wright*, 240 N.W. 116, 117 (Minn. 1931), follows *Glanzer* and states that the action "sounds in tort even though a contract was involved."

128. Bernard Rudden, *Torticles*, 7 TUL. CIV. L.F. 105 (1992). For essentially the same point made seventy years earlier (though less engagingly), see Jeremiah Smith, *Torts Without Particular Names*, 69 U. PA. L. REV. 91 (1921). Theorists of the late nineteenth and early twentieth centuries threw up their hands at the prospects of finding a unifying theory of torts. Salmond observes, "the distinction [between wrongs that are torts and those that are not] is in part merely historical, and not purely logical, and from the point of view of pure theory we should attempt in vain to discover any test of it." SALMOND, *supra* note 53, at 559. Holmes made a stab at doing for Tort what the classical theory attempted to do for contract—that is, to attempt to define a tort from the perspective of the actor at the moment he or she commits a tortious act, "considering only the principles on which the peril of his conduct is thrown upon the actor." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 79 (1881).

129. D.J. Ibbetson, *The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries*, in NEGLIGENCE: THE COMPARATIVE LEGAL HISTORY OF THE LAW OF TORTS, *supra* note 70, at 229, 234.

130. The earliest tort treatises assume that a cause of action lies in tort as well as contract for "neglect of a duty" founded upon a contract. C.G. ADDISON, *WRONGS AND THEIR REMEDIES: BEING A TREATISE ON THE LAW OF TORTS*, at v (1860).

simple negligence. Why tie the claim to misrepresentation? As I show in this Section, one reason they did so was to express the claim's contractual features.

Courts and legal theorists did not address the "vexed question of liability for negligent language"¹³¹ in a systematic way until the late nineteenth century. In *An Introduction to the Philosophy of Law*, published the same year as the decision in *Glanzer v. Shepard*, Pound attributed the "reluctance of courts to apply the ordinary principle of negligence to negligent speech" to "the attitude of the strict law in which our legal institutions first took shape."¹³² In his view, this was perpetuated by "a feeling that 'talk is cheap,' that much of what men say is not to be taken at face value and that more will be sacrificed than gained if all oral speech is taken seriously and the principles applied by the law to other forms of conduct are applied rigorously thereto."¹³³ The common law and equity long had devices for holding an actor responsible for careless speech in a transaction benefitting the actor,¹³⁴ and, one may infer, for holding an actor liable for loose speech that puts a plaintiff in the way of physical harm.¹³⁵ *Pasley v. Freeman*¹³⁶ marks the first time an English court prominently addressed liability for misleading another in a context involving neither physical harm nor a transaction benefitting the deceiver at the expense of the deceived. The case presented what everyone agreed to be a novel question: does an action for deceit lie when a defendant induces the plaintiffs to sell costly goods to a third party on credit by knowingly misrepresenting that the buyer is credit worthy? It is clear from the opinions in the case that no one thought the defendant would have been liable had he merely been negligent in misleading the plaintiff.¹³⁷ It seems the question did not cross anyone's mind.

131. *Int'l Prods. Co.*, 155 N.E. at 663.

132. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 280 (1922). Pound's "strict law" appears to refer to an imagined earlier time in the common law, presumably meaning the era in which the forms of action determined what claims were justiciable, in which "individualization [of justice] was to be excluded by hard and fast mechanical procedure." *Id.* at 113. Recent scholarship indicates the forms of action were not all that constraining.

133. *Id.*

134. Samuel Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911), provides a good background on the use of doctrines like warranty, rescission, and estoppel to reach negligent misrepresentation in a contractual setting, and even to reach innocent misrepresentation.

135. IBBETSON, *supra* note 68, at 64 (concluding that "[t]he medieval law of torts was primarily concerned with the granting of redress for physical injury Indeed, it could be said that there was a general principle that an individual who had unjustifiably caused physical injury to another's person or property . . . should be liable.").

136. (1789) 100 Eng. Rep. 450 (K.B.).

137. A divided court allowed the claim. *See id.* at 458. Judge Grose dissented, noting the unprecedented nature of the claim and arguing that if the claim were allowed it would lead to a flood of claims against by-standers who recommended contracts that turned out to be ill-advised. *See id.* at 451–53. The majority's response to this worry makes it clear that no one thought liability for careless speech was on the table. It responded that the claim was a novelty and that the defendant had an interest in misleading the claimants or (even worse) that he acted out of malice could be inferred from the fact that he intentionally misled the claimants. *See id.* at 455, 456, 458. In reality the claim may not have been quite so novel. JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 1483–

Liability for financial harm caused by careless speech was a live question by the late nineteenth century. In England, the House of Lords foreclosed a deceit claim absent a finding of dishonesty in *Derry v. Peek*.¹³⁸ English cases following closely on the heels of *Derry v. Peek* held that its logic also barred an action on the case for negligent speech as well as an action in equity seeking affirmative relief. American legal scholars of the period strongly objected to these decisions on doctrinal and moral grounds. They argued that American courts had imposed liability in cases similar to *Derry v. Peek* by stretching deceit, typically by presuming that a defendant knew the falsity of a fact he communicated if his position placed him under a duty to determine the truth of the matter and gave him the means to do so.¹³⁹ Of the morality of the matter, Williston wrote,

[t]he inherent justice of the severer rule of liability . . . is equally clear. However honest his state of mind, [the defendant] has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had just reason to attribute to the defendant accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable.¹⁴⁰

Jeremiah Smith argued the only sound reason for refusing to impose liability in cases similar to *Derry v. Peek* was the difficulty of establishing a “stopping-place short of enforcing a legal duty to use reasonable care in making all statements.”¹⁴¹

While American legal theorists of the time were largely unified in their opposition to the principle of *Derry v. Peek*, they disagreed about where to situate the liability rule in the law.¹⁴² Francis Bohlen and Leon Green squared

1558, at 773 n.44 (2003) (reporting two cases pleading deceit involving misleading character references).

138. (1889) 14 App. Cas. 337 (H.L.).

139. Jeremiah Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 191–92 (1900). Bigelow treats the rule as being uncontroversial in his 1877 treatise. See MELVILLE M. BIGELOW, *THE LAW OF FRAUD AND THE PROCEDURE PERTAINING TO REDRESS THEREOF* 57–63 (1877). He summarizes: “Deceit or an action for relief in equity can be maintained (other elements being present) . . . for a false representation believed to be true, but the truth of which he was bound to know.” *Id.* at 63. As for when there is a duty, Bigelow concludes that the cases “may mostly be embraced under the general proposition[] that a man is supposed and required to know all matters pertaining to his own business.” *Id.* at 57. Williston, after reviewing much of these materials, concludes that it is unclear whether the doctrine extends beyond cases “where the profit of the misrepresentation enures [sic] to the benefit of the defendant, or he is a party to a contract with the plaintiff induced by the misrepresentation.” Williston, *supra* note 134, at 433. He continues, “there is certainly enough authority to put the bench and bar upon inquiry as to the intrinsic merit” of the broader principle of liability advocated by Smith. *Id.* at 433–34.

140. Williston, *supra* note 134, at 435.

141. Smith, *supra* note 139, at 194.

142. Williston objects to treating the problem as one of negligence because “the law of liability for false representations has grown up on other lines than the law of negligence. There is a violation of historical continuity in forcing the two together.” Williston, *supra* note 134, at 436–37. He concludes

off on this issue in the early 1930s. The first shot came in a 1929 article by Bohlen arguing the problem should be treated in the context of the law of negligence, rather than the law of deceit or warranty.¹⁴³ Bohlen treated the problem as one of negligence in order to import liability-limiting features of negligence law that have since eroded. From a modern perspective, this is incongruous, since we normally associate the law of negligence with the expansion of liability. One such liability-limiting feature cited by Bohlen was the defense of contributory negligence.¹⁴⁴ The other was a rule—akin to a rule in the law of landowner liability at that time (but no longer)—that an actor who supplies information gratuitously is liable only if he has reason to know the information is misleading and conceals or fails to disclose this fact when it is not reasonably apparent.¹⁴⁵

Leon Green responded to Bohlen in a 1930 article entitled *Deceit*, arguing that the law of deceit could reach cases like *Derry v. Peek*.¹⁴⁶ The article is remembered for its heady legal realism. Green observed that the legal definition of the scienter of deceit was sufficiently varied across jurisdictions and was sufficiently “elastic” to “allow the broadest range, both in the exercise of the court’s own judgment and in permitting the employment of a jury.”¹⁴⁷ Green argued that the elasticity of the definition permitted a court to put a claim of inadvertent misrepresentation to a jury if the defendant’s conduct seemed sufficiently culpable, and to allow the jury to find liability. Turning to Bohlen’s article, Green argued that “the negligence network of legal theory was developed through cases involving hurts to the physical integrity of person and property” and might not be “adequate or adaptable for the cases involving unintentional misuse of words in business transactions.”¹⁴⁸ Green continued, even “assuming that the negligence network of theories could be successfully adapted,” it might make no difference in results, for “[t]he courts have many devices for bringing a negligence case under their own exclusive power without the participation of a jury.”¹⁴⁹ He concluded by disparaging the possibility of devising formulae better than those already found in the law of deceit to define

that the problem is dealt with in the context of warranty and estoppel. For a case employing estoppel, see *Conway National Bank v. Pease*, 82 A. 1068 (N.H. 1912). A later case from the same court that is contemporaneous with *Glanzer* recharacterizes the theory as negligent misrepresentation. *Weston v. Brown*, 131 A. 141 (N.H. 1925). The court extends an earlier New Hampshire case holding a seller liable for negligently misrepresenting that polish could safely be used on a stove to a claim for pure economic loss, reasoning that the nature of the loss did not preclude the action so long as the parties were in a relationship that provided a basis for finding a duty.

143. Francis H. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929).

144. *Id.* at 739–40.

145. *Id.* at 741–43.

146. Leon Green, *Deceit*, 16 VA. L. REV. 749 (1930).

147. *Id.* at 757.

148. *Id.* at 758.

149. *Id.* at 759.

when an actor is subject to liability for inadvertently misleading another in a business transaction.¹⁵⁰

Bohlen responded to Green in a 1932 article entitled *Should Negligent Misrepresentation Be Treated as Negligence or Fraud?*¹⁵¹ Much of the article criticized Green for arguing that courts should address negligence using “legalistic”¹⁵² subterfuge—or “hocus pocus”¹⁵³—by describing conduct that is merely negligent as being dishonest. The part of Bohlen’s response that directly bears on the taxonomic question comes at the end of the article. It is worth quoting at length:

In one particular the “negligence formula” permits a wider ambit of responsibility than the deceit formula, since in the former all that is necessary to create liability to a particular plaintiff is that the defendant should have realised that his act involved an unreasonable risk of injuring the plaintiff, whereas under the deceit formula the plaintiff must have been *intended* to act upon the false statement. Indeed, his action must be in respect to the very transaction contemplated.¹⁵⁴

Bohlen continued, “intent . . . requires that the representation shall be made for the purpose of inducing the plaintiff to act.” He noted the possibility that the “broader concept of the ambit of responsibility which is habitual to negligence” might someday extend to “conscious fraud,” but that this process “is likely to be slow and gradual,” and in the meantime “[i]t is highly improbable that courts will extend the liability for merely negligent

150. *Id.* at 761–62.

151. Francis H. Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?*, 18 VA. L. REV. 703 (1932).

152. *Id.* at 712.

153. *Id.* at 711.

154. *Id.* at 718–19. Bohlen does not pull the requirement of intended reliance out of thin air. His explanatory notes on the draft section on negligent misrepresentation cites a score of cases explaining liability for negligent misstatement in these terms. RESTATEMENT OF TORTS §§ 633–39 (Preliminary Draft No. 79, 1935). Prominent among these cases is *Glanzer v. Shepard*, 135 N.E. 275, 276–77 (N.Y. 1922) (“A like principle applies, however, where action is directed toward the governance of conduct . . . The defendants, acting . . . at the order of one with the very end and aim of shaping the conduct of another.”). Bohlen might also have cited Smith, *supra* note 139. Smith notes the stringency of requiring that the “[d]efendant made the statement with the intention that the plaintiff should act upon it,” particularly when coupled with a requirement that the plaintiff “would be likely to incur substantial pecuniary loss in case the statement proved incorrect.” *Id.* at 196. He argues that a less stringent rule would create too much uncertainty because different juries would have different views on “under what circumstances the law should impose a duty to be careful in the use of language.” *Id.* at 197. The stringent rule is “entirely defensible” because in cases within the rule “the average man ought to fully recognize his moral responsibility to be careful.” *Id.*

The rule of intended reliance might still have done some useful work in the law of deceit by answering in the negative the question of whether it is wrongful for an actor to knowingly disseminate false information when the actor does not intend or expect anyone to alter his conduct on the basis of the information. This is akin to the duty question in negligence law. A “white lie” is not deceit even if a plaintiff unexpectedly relies on the lie and is harmed. But liability in such cases is avoided by means other than a rule of intended reliance. In the United States this work is largely done by the doctrines of materiality and justifiable reliance.

misrepresentations beyond that to which they will carry responsibility, for the more culpable, conscious and dishonest misstatements.”¹⁵⁵ A few years later Bohlen, as Reporter for the part of the Restatement of Torts covering misrepresentation, included the intended reliance requirement in the black letter. The Comments explained that the requirement came from the law of deceit.¹⁵⁶

The answer to the question, “why negligent misrepresentation?” lies partly in Green’s critique of Bohlen and partly in Bohlen’s response. Green drew the more obvious and general connection. His point was that the problem of inadvertent misstatement in a business context is far afield from problems of accidental physical harm traditionally dealt with by negligence law, and is closer to problems traditionally dealt with in the law of deceit. This is particularly true of borderline cases of deceit involving an affirmation of fact in which the speaker knows he does not have adequate knowledge to confirm the accuracy of the fact he affirms.

Bohlen drew a subtler, more specific connection. He tied liability for negligently misleading another to deceit—characterizing both as torts involving misrepresentation—in order to import from the law of deceit a rule of intended reliance as a limit on duty and the scope of liability. Bohlen thought the rule of intended reliance in the law of deceit required something like a contractual relationship or privity between the deceiver and the deceived for knowing deception to be actionable. In sum, Bohlen described the claim as one of misrepresentation to express its essentially contractual character through the requirement of intended reliance.

Bohlen’s reason for connecting liability for negligent misstatement to deceit no longer exists for intended reliance no longer is an element of deceit. Bohlen was able to make it an element in the First Restatement of Torts, but the rule did not long survive in the law of deceit, because it had unattractive and even bizarre consequences.¹⁵⁷ The rule lives on in the law of negligent

155. Bohlen, *supra* note 151, at 720.

156. RESTATEMENT OF TORTS § 633 (Preliminary Draft No. 79 pt. 2, 1935).

As in the case of fraudulent misstatements the liability is confined to (is enforceable only by) those who are intended to use the information and who use it in the way in which they are intended to use it. This distinction comes not from the fact that the matter supplied is information rather than a tangible thing but from the fact that it is supplied for guidance in financial and commercial transactions and not for guidance in a matter in which the safety of person, lands or chattels is involved.

Id. A lightly edited version of this text appears in RESTATEMENT OF TORTS § 552 cmt. a (1938). “Purpose” is substituted for “intent” in the first sentence so that it reads “the liability is confined to those who are intended to rely upon the information and who rely upon it in a type of transaction in which it is the maker’s purpose to influence their conduct.”

157. See RESTATEMENT OF TORTS § 531 (1938). Intent is defined as making a misrepresentation with a purpose of inducing a plaintiff’s reliance or with substantial certainty a plaintiff will rely. Critics argued that if *A* knowingly supplies false information to *B* for the purpose of misleading *B* in decision *x*, then *A* should be liable to *B* if *B* relies on the information in decision *y*, even if this is not *A*’s purpose (so long as *A* has sufficient forewarning of this risk). Critics further

misrepresentation. It reappears in the Restatement (Second) of Torts, and some courts and theorists use it to explain limits on duty and liability.¹⁵⁸ While a rule of intended reliance explains easy cases,¹⁵⁹ it is inadequate to the task. A rule of intended reliance is fraught with ambiguity in ways that invited reliance is not.¹⁶⁰ A rule of invited reliance ties together the actor, the recipient, the information, the recipient's reliance, and the observable circumstances of a situation by making it clear that the relevant intent is an apparent intent on the part of the actor that the recipient be able to rely on the information in the manner in which the recipient does rely.

argued that *A* also should be liable to *C* if *C* relies on the false information (again so long as *A* has sufficient forewarning of this risk). Borrowing from the literature on proximate cause in negligence, we might describe the first case as a problem of unintended harm to an intended victim of deceit and the second case as a problem of an unintended victim of deceit. In a 1938 article Page Keeton lamented that the rule of intended reliance afforded *A* immunity in both cases, calling it a "deformity in the law of deceit." W. Page Keeton, *The Ambit of a Fraudulent Representor's Responsibility*, 17 TEX. L. REV. 1, 26 (1938). Focusing on the problem of an unintended victim of deceit (the second case), in a 1939 article Seavey celebrated Cardozo's assault on the traditional rule of no liability in *Ultramares*. Seavey, *supra* note 38. Seavey closed with a flourish, tying this aspect of *Ultramares* to Cardozo's decision in *McPherson*: "It is here [in the law of deceit] that 'the assault upon the citadel of privity' should be most vigorous. The cheat has no barrier of sympathy behind which he can take refuge when once a breach in the citadel is made." *Id.* at 52. The position of Cardozo, Keeton, and Seavey prevailed over the position taken by Bohlen in the First Restatement. This aspect of the scenter of deceit has been reduced to what is in essence a requirement of predictable reliance. See James & Grey, *supra* note 16, at 289–96.

158. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 5(2) (Tentative Draft No. 1, 2012) (limiting liability for negligent misrepresentation to "the person or one of a limited group of persons for whose guidance the actor intends to supply the information" and only through "reliance upon the information in a transaction that the actor intends to influence"). For a collection of cases applying a rule of intended reliance, see *id.* at 92 (Reporter's Note to Comment g).

159. The easy case for liability is where a defendant directly supplies information to a plaintiff with the obvious "end and aim" of guiding the plaintiff's conduct in precisely the transaction that results in the loss. The easy case for no liability is where the information is used in a way that a defendant could not reasonably have expected when supplying it, particularly if the information is used by a plaintiff with whom the defendant had no contact. Reliance plainly is intended in the first case, and plainly is unintended in the second.

160. For instance, should we understand intent to require purpose or mere knowledge? Assuming that intent means purpose (as Bohlen does), how does one define purpose? Must the plaintiff's reliance be an actor's ultimate purpose? Or is it enough that the plaintiff's reliance is necessary for the actor to achieve some other ultimate purpose? How does one define the desired consequence of reliance? Must the information be intended to compel the plaintiff's decision? Or does it suffice that the information is intended to weigh significantly on a decision? Or is it merely necessary that the information is intended to be a factor bearing on a decision? If we accept that an actor may owe a duty—and be liable—to a plaintiff whose specific identity he does not know, who is involved in a transaction of which the actor is unaware, then our definition of the requisite intent may dramatically impact the scope of an actor's duty and liability. This issue arises, for instance, when the requisite threshold intent is defined as intent on the part of an actor that information he supplies be relied upon by a class of persons in a class of transactions. In courts that embrace this definition of intent, whether the rule is applied will largely depend upon whether the court adopts a broad or narrow definition of the class of persons and the class of transactions intended to be influenced by the information.

Experience proves Green was wrong and Bohlen was right about one thing. The profound difference between knowingly and inadvertently misleading someone makes it untenable to use the rubric of deceit as a means to impose liability against a defendant for negligently misleading another, as doing so requires asking judges and jurors to disingenuously imply bad intent. Liability for negligently misleading another should be disassociated from deceit in American law, perhaps even to the point of substituting “misstatement” for “misrepresentation.” Elsewhere in the common law world the action is described as negligent misstatement. I will so refer to the claim for the remainder of this Article.

III.

CONTRACT AND NEGLIGENCE IN THE TWENTIETH CENTURY

This Section brings the story of contract theory up to the present. It also introduces the negligence action, which crystallized in the twentieth century, and explores recent criticism of the dominant theory of negligence. The major point is that negligent misstatement is better handled as a problem of contract than a problem of negligence as those fields now are conceived. It also says something about the best theories of contract and negligence and about what makes a good theory of a field of law.

A. Contract Loosely Conceived as Private Ordering

There always has been a space in American contract law, meaning the law applied by the courts, for claims based on misperformance of gratuitous or informal undertakings, including a claim of detrimental reliance on misleading or inaccurate information supplied by a defendant to guide a plaintiff. Theories of third party beneficiary¹⁶¹ and promissory estoppel,¹⁶² which became widely

161. A typical case is similar to *Glanzer v. Shepard* and involves reliance by a buyer on an inaccurate report on the condition or quality of property supplied by the defendant pursuant to a contract with the seller. Usually third party beneficiary is pled in the alternative. See, e.g., *Stotlar v. Hester*, 582 P.2d 403 (N.M. Ct. App. 1978); *Rodin Props.-Shore Mall N.V. v. Ullman*, 694 N.Y.S.2d 374 (1999); *Ramos v. Arnold*, 169 P.3d 482 (Wash. Ct. App. 2007). Albert L. Wheeler, III, *Real Estate Appraisal Malpractice Liability to Nonprivy Third Parties: Questioning the Applicability of Accountant Liability to Third Party Cases*, 25 REAL PROP. PROBATE & TRUST J. 723, 731–35 (1991), works through the law and observes that he could find no cases in which the plaintiff proceeded solely on a theory of third party beneficiary. Some courts explicitly conflate the two claims. *Plourde Sand & Gravel Co. v. JGI Eastern, Inc.*, 917 A.2d 1250, 1255 (N.H. 2007), notes that the basis for finding a duty in tort is the same as the standard for third party beneficiary. Some courts permit the claim only on a theory of third party beneficiary. See *Buchanan v. Georgia Boy Pest Control Co.*, 287 S.E.2d 752 (Ga. Ct. App. 1982); *Partout v. Harper*, 183 P.3d 771 (Idaho 2008); *Emmons v. Brown*, 600 N.E.2d 133 (Ind. Ct. App. 1992). The third party beneficiary theory does more work in the law of economic negligence in cases in which the harmful conduct does not involve supplying misleading information to the claimant. See, e.g., *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (addressing a claim by intended beneficiaries of a will for loss resulting from attorney’s negligence in drafting the will). It also does more work in cases involving dissemination of harmful information when a claim of negligent misrepresentation is not possible because the loss did not result from the plaintiff’s reliance on the

available in the middle part of the twentieth century, are the usual vehicles for such claims today. But the claims appeared earlier in other forms, such as warranty and equitable estoppel.¹⁶³ Courts routinely treated some types of informal undertakings based on invited reliance as enforceable agreements without recourse to more specialized doctrines, simply by implying a promise to use due care.¹⁶⁴

Changes in American contract law in the twentieth century made it even easier to describe as contractual a duty of care based on invited reliance. During the twentieth century, American courts generally took a more contextualist and less formalist approach to determining the existence and content of contractual obligations. The emergence of promissory estoppel as a basis for recovering

information. *See, e.g.*, *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162 (3d Cir. 2008) (applying Pennsylvania law to a case in which credit card issuers sued merchants to recover losses resulting from stolen credit card information); *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs. Grp.* 171 Cal. App. 4th 35 (2009) (deciding a case where excess insurer was harmed when the primary insurer paid claim relying on defendant's negligent approval).

162. For example, there are many cases that rely on the theory of equitable estoppel to allow an insured who relies on an agent's misstatement regarding the scope of coverage to recover benefits based on the misstated terms. *See, e.g.*, *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984); *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969); *Youngblood v. Auto-Owners Ins. Co.*, 111 P.3d 829 (Utah Ct. App. 2005). Other cases describe the theory as promissory estoppel. *See, e.g.*, *Traveler's Indemnity Co. v. Holman*, 330 F.2d 142, 151 (5th Cir. 1964); *Midamar Corp. v. Nat'l Ben-Franklin Ins. Co.*, 898 F.2d 1333, 1337 (8th Cir. 1990) (applying Iowa law); *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 662 (Fla. 1987); *Bill Brown Constr. Co. v. Glen Falls Ins. Co.*, 818 S.W.2d 1 (Tenn. 1991). For the contrary view that estoppel may not be used to expand the scope of coverage, *see Harasyn v. St. Paul Guardian Ins. Co.*, 75 S.W.3d 696 (Ark. 2002).

163. Williston tried to fit warranty and estoppel claims into contract law as he conceived the field, albeit with a bit of conceptual sleight of hand. The lack of intent to undertake a legal obligation was not a sticking point for Williston. He observes in the first edition of his contracts treatise:

Parties to an informal transaction frequently are not thinking of legal obligations. They intend an exchange, a gift, or to induce action by the other parties when they make promises, and to make the obligation of such promises depend upon the accident of the promisor's reflection on his legal situation is unfortunate.

WILLISTON, *supra* note 102, at 22. This is expressed in RESTATEMENT OF CONTRACTS § 20 (1932) (“[Neither] real [nor] apparent intent that the promises shall be legally binding is essential.”). *See also* Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1750–56 (2008).

The sticking point for Williston was instead the lack of a forward-looking commitment. He tried to squeeze liability for misrepresentation of fact into contract by reasoning, “The promises in such contracts are in effect agreements to be liable for damages arising from the non-existence or existence of the fact to which the agreement relates.” WILLISTON, *supra* note 102, at 30. Williston did not explain how a person could “in effect” agree to be liable for damages for a misrepresentation without thinking about the legal consequences that might arise if the representation were to prove false.

164. *See Mayhew v. Glazier*, 189 P. 843 (Colo. 1920). Glazier gave Mayhew, an agent for National Union, an application for hail insurance and a promissory note for the premium. *Id.* at 843–45. Glazier testified that Mayhew assured him that he would have the policy issued without delay. *Id.* at 843. Mayhew dallied and the crop was damaged by a hail storm before Mayhew submitted the application and note. *Id.* The trial court found that it was clear to all that Mayhew was not acting as an agent of National Union, but rather in his individual capacity, when he took the application and note and made the assurances. *Id.* at 845. Mayhew argued that he could not be held individually liable for it was understood that he acted as agent for the insurance company and that state law prohibited dual agency. *Id.*

damages for nonperformance of an incomplete or otherwise imperfect commercial agreement is an important part of this story.¹⁶⁵ American contract theory has moved along with the contract law of the courts. Today “reliance theories” of contract compete with “promise theories” of contract. While some theorists favor one theory over the other, many embrace theoretical pluralism as the most descriptively accurate and normatively appealing position.¹⁶⁶

The loosened field nonetheless remains recognizably distinct from tort law, notwithstanding rhetorical claims to the contrary by scholars like Grant Gilmore and Patrick Atiyah.¹⁶⁷ On the ground level, the theory of promissory estoppel merely overrides formal requirements for imposing liability when a plaintiff detrimentally relies on the broken promise. Most everywhere, detrimental reliance can override the absence of consideration and the absence of definite terms. In some states, it can override a statute of frauds defense. Reliance-based theories of damages are available everywhere if the expectancy loss from non-performance is speculative. Liability in contract still requires proof of an apparent promise, breach, and a possibility of harm. Reliance-based theories do little if any violence to the possibility of private ordering because an actor may avoid reliance-based liability by disclaiming legal responsibility.¹⁶⁸

165. See, e.g., *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520 (Ill. 2009) (deciding a case of representation to prospective purchaser of dealership that it would be made a dealer if it purchased existing dealership); *Olympic Holding Co. v. ACE Ltd.*, 909 N.E.2d 93 (Ohio 2009) (allowing promissory estoppel as a “separate remedy” for breach of a promise to execute an agreement that was unenforceable under the statute of frauds); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965). A few states have rejected promissory estoppel as an action. See *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512 (Va. 1997). Virginia does not recognize an action for negligent misrepresentation, though some of the ground is covered by constructive fraud. *SuperValu Inc. v. Johnson*, 666 S.E.2d 335 (Va. 2008); see generally Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake”*, 52 U. CHI. L. REV. 903 (1985); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

166. ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997), is a comprehensive pluralist account that uses these terms to divide the field. Klass, *supra* note 163, is a pluralist account that contrasts the view of contract law as power-creating with the view of contract law as duty-imposing. Klass offers a “creation myth” of a body of law that begins as duty-imposing but develops into a body of law that is power-creating as people and courts become accustomed to the self-conscious use of duty rules to plan forward-looking transactions. *Id.* at 1759–60. Smith helpfully classifies reliance and promise theories as addressing the analytical question “what causative event is the basis of contract?,” which he distinguishes from the normative question “why give legal force to contractual obligations?” SMITH, *supra* note 9, at 46–49. Smith argues a promissory, rights-based theory best fits contract law. *Id.* at 5.

167. See ATIYAH, *supra* note 63; GRANT GILMORE, *THE DEATH OF CONTRACT* (1974). If Gilmore and Atiyah truly believed the claim (it is fairly clear they wrote for effect), then they would be committing the same mistake as John Innes Clark Hare. This mistake is to assume that an obligation is either wholly the product of a person’s will or else it is wholly the product of a court’s will.

168. Richard Craswell, *Two Economic Theories of Enforcing Promises*, in *THE THEORY OF CONTRACT LAW* 19 (Peter Benson ed., 2001), makes this point in answering Atiyah’s claim that [a]s soon as liabilities come to be placed upon a person in whom another has reposed trust or reliance, even though there is no explicit promise or agreement to bear that liability, the

Negligent misrepresentation has a natural home in contract alongside promissory estoppel. The claim could be covered by adding a Section 90A to the Restatement of Contracts. Section 90A might provide that an actor who supplies information to another, and who reasonably appears to invite the recipient to rely on the information, implicitly promises to use due care in supplying the information. Gratuitous agency and the like could be covered by adding a Section 90B. It might provide that an actor who renders a service to another either gratuitously or pursuant to a contract with someone else, and who reasonably appears to invite the other to rely on the actor to render the service, implicitly promises to use due care in rendering the service. The Comments would explain that invited reliance is the gist of the claim and the reason for implying a promise to use due care.

Current objections to expanding contract to include reliance-based liability are of two types. One objection argues it is important to delimit the causative events of a rule of reliance-based liability to prevent the rule from becoming a vehicle for courts to shift losses between parties based on fairness and other policy considerations. For example, Stephen Smith argues that while English courts have tried to limit liability for negligent misstatement to cases in which the parties are in a “special relationship” or there is an “assumption of responsibility,” these concepts are so normatively opaque and ambiguous that liability ends up turning on an amalgam of imprecise factors.¹⁶⁹ Limiting reliance-based liability to invited reliance—where an actor supplies information with an apparent purpose that the recipient be able to rely on it—avoids this objection. There is good reason to believe courts will be able to understand the concept and to abide by it, for invited reliance is no more opaque or ambiguous than the concept of a promise. Indeed, invited reliance succinctly describes a basis of obligation courts have recognized for centuries. Moreover, the tools available to courts to discern invited reliance are already widely used to infer intent and purpose under existing contract law.

The other objection is that liability based on invited reliance lacks an essential feature of contract. This was the position of classical theorists. Today it is the position of Stephen Smith and Peter Benson. For Smith, the essence of contract is promise. For Benson, the essence of contract is that an undertaking creates a legal right in a promisee akin to a property right.¹⁷⁰ It is impossible to deny the analytical and descriptive power of their theories of contract. If *A* invites *B* to rely on a statement *x*, it is unlike *A* promising *B* to do *x* because a promise is future-regarding. A promise restricts *A*'s freedom of action in the

door is opened to a species of liability which does not depend upon a belief in individual responsibility and free choice.

Id. at 42–44 (quoting ATIYAH, *supra* note 63, at 6–7).

169. SMITH, *supra* note 9, at 81–82.

170. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT* 118, 174–75 (Peter Benson ed., 2001); *cf.* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970). Leff is being ironic. Benson is not.

future. This difference is not trivial. Similarly, if *A* invites *B* to rely on a statement *x*, it is unlike *A* warranting *x* to *B* since a warranty is both a guarantee of the accuracy of *x* and, conventionally, a signal that the statement *x* is meant by *A* to have legal consequences. And if *A* says to *B*, “I consider myself under a contractual obligation to do *x*,” this is importantly different than *A* saying, “I promise to do *x*” for the language of contract indicates *A* probably means the communication to have legal importance. It is a momentous thing when people invoke the state’s coercive power to back up a representation or promise, and much of contract law exists precisely to identify these momentous undertakings and delineate their legal consequences. A partial list of rules that serve these functions includes the rules on offer and acceptance, rules concerning contract formalities, rules like consideration that exclude from contract social undertakings that do not have legal consequences, and rules on excuse. Many rules at or near the core of contract law are about private legislation.

Where Smith and Benson err is in assuming that the theoretical core of contract law must necessarily define the periphery of the field, requiring the exclusion of liability for negligent performance of an informal undertaking. This is the same mistake classical theorists made. Smith is a good target here, for he is clearer than most about what he wants out of a theory of contract. He argues that a good theory should illuminate the core features of the law of contract by relating them to a single attractive moral principle that is consistent with what users of contract law understand its purposes to be.¹⁷¹ Smith makes a strong case that a rights-based promissory theory of contract admirably fits this bill. Indeed, there is much to be said for an even narrower theory of contract that strictly confines the field to only a forward-looking commitment that is intended to be backed up by the force of law (i.e., private legislation). In a beauty contest, Pollock’s theory of contract might well beat out Smith’s theory.¹⁷² But the best theory of contract may not be the most elegant or tight, and it is a mistake to assume that the best theory to define the core of contract must also define its periphery. Smith falls into this trap when he argues that the legal relations entailed in a simultaneous exchange, such as taking a bus, are not a matter of contract law because “the parties do not *agree or promise or undertake* to do anything. Rather they simply do something”¹⁷³ Smith goes

171. SMITH, *supra* note 9, at 7–32.

172. A forward-looking commitment that is intended to be backed up by the force of the law is the core example of private ordering through contract. A forward-looking commitment that is intended to be acted upon by another (i.e. a promise) lies a small distance from the core in the dimension of being less legally directed. A representation of fact that is intended to be backed up by the force of the law (i.e. an express warranty) lies a small distance from the core in the dimension of being less forward-looking. A forward-looking commitment to use care in rendering a service lies further from the core in the dimension of retaining some flexibility regarding performance. An apparent but unintended forward-looking commitment lies a rather large step from the core in the dimension of being an unwillful obligation. A duty of care based on invited reliance is distant from the core on all of these dimensions.

173. SMITH, *supra* note 9, at 176.

on to argue that simultaneous exchange is best treated outside contract law because any theory capacious enough to include it would also include “various acts that arguably should be kept outside,” such as gift-giving.¹⁷⁴ And he argues there is no practical need to account for simultaneous exchange as a problem of contract because the legal problems that arise from simultaneous exchange can be adequately dealt with by the law of unjust enrichment or negligent misstatement.¹⁷⁵

Smith’s exclusion of simultaneous exchange from contract law is defensible if the goal is to construct the most elegant or tight theory of contract. But it is difficult to defend if the goal is instead to come up with the most accurate, workable analytic account of the entire law of obligations. To make the law of obligations coherent, we must divide it into a workable number of fields. Peter Birks thought there were three major fields—contract, tort, and unjust enrichment—and a residual category covering all other types of obligations.¹⁷⁶ Carving up the law of obligations into a workably small number of fields inevitably sacrifices theoretical elegance: if we take each of these fields of law on its own terms, come up with the best theory to account for the core of a field, and exclude from a field cases that did not conform to the best theory, then we will end up with an unworkably large number of fields of law.

Smith’s example of simultaneous exchange illustrates. The fields of unjust enrichment and negligence offer no home for simultaneous exchange if you take the best account of each of them.¹⁷⁷ Thus we end up with separate fields of obligation for contract, unjust enrichment, negligence, and simultaneous exchange. This is just the beginning. To account for informal undertakings that entail a duty of care we would need to add to this list bailment, gratuitous agency, negligent misstatement, and more. We end up with an impossibly long list of obligations. The problem is more than esthetic. As Llewellyn observes, obligations that do not fit within a major field “drop quietly out of

174. *Id.* at 177.

175. *Id.* at 178–79.

176. Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1771 (2001); Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTL. L. REV. 1, 10 (1996). This list is a bit misleading, for few people who have thought seriously about the subject believe tort law is a coherent field itself. Specific torts may be coherent fields. We will see in a moment negligence has become a coherent field of law (though some disagree vehemently).

177. For a persuasive argument that the core case of unjust enrichment is a mistaken payment of money see PETER BIRKS, *UNJUST ENRICHMENT* (2d ed. 2005). Only a simultaneous exchange that has gone dramatically awry is handled anything like a mistaken payment of money. I expect Smith thinks simultaneous exchange presents a problem for the law only if an exchange goes dramatically awry, in which case it presents either a problem for the law of unjust enrichment (if an exchange goes dramatically awry in the direction of unexpected inequality of value) or a problem for the law of negligence (if an exchange goes dramatically awry in the direction of a quality defect in a chattel causing consequential harm). A problem with this way of thinking is that exchanges may go awry in less dramatic ways, as for example, when a chattel has predictable quality defects that merely impair its value. Also, it is odd to build the law of simultaneous exchange around the most pathological cases. Would Smith do the same thing for gifts?

contemplation, unnoticed, unmissed, unmourned—and *unaccounted for*.¹⁷⁸ We may realistically expect non-specialist judges and lawyers to be familiar with the core principles of a few major fields of the law. More than this is unrealistic.

A workable taxonomy of law requires fundamental trade-offs. Greater precision in our theoretical definition of a field's core must at some point come at the expense of analytic accuracy and workability at the periphery. The success of classical theories of contract and the modern theory of negligence suggest tight theories are going to win out over fuzzy theories in defining the core of a field in any event. This is to be expected. Most teaching and theorizing about a field focuses on the core, and a tight theory will always explain the core better than a fuzzy theory. But the example of negligent misstatement illustrates the importance of weighing the allure of elegant theories against practical exigencies. We need to learn to live with some sloppiness in specifying the periphery.

The question then is not whether negligent misstatement belongs in contract in light of the best theory of contract. Rather the question is whether the claim is better described as a problem of contract than the alternatives. I take the alternatives to be negligence, deceit, or a free-standing action. The last option is a bit misleading, for it only moves the question of classification down a level. If we describe negligent misstatement as a free-standing action, then the first thing we will need to do in the law of negligent misstatement is to explain how its rules do and do not compare to the familiar rules of deceit, contract, or negligence. Experience shows deceit is a poor choice. Contract is a better fit but it is not perfect because of the dissimilarities between private legislation, promising, and invited reliance. Why not negligence then?

B. The Rise of Negligence as Liability for Harm Carelessly Caused

To understand the arguments for and against treating negligent misstatement as a problem of negligence, one must appreciate the historic arc of the negligence action. Two important themes for present purposes are the expansion of tort liability through the generalization of the duty of care and the erosion of liability-limiting doctrines, as well as the pushback against the expansion of tort that began in the 1980s.

Looking back to the eighteenth century, Percy Winfield observed that liability for carelessly caused harm began in cases in which duty was "taken for granted."¹⁷⁹ At this early juncture, negligence liability was confined to cases in which the defendant either "put himself in a position in which any sensible man would act carefully (e.g. assuming control of dangerous things) or . . . assumed

178. Llewellyn, *supra* note 49, at 705.

179. Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 48 (1934).

something like a *status* which demanded professional skill on his part.”¹⁸⁰ The absence of duty as a separate element of negligence, much less anything resembling a general duty of care, limited the scope of the negligence action to specific categories of cases.

During the nineteenth century, liability for carelessly caused harm was extended to new categories of cases. The process was gradual, with courts generally working by analogy from established cases of liability.¹⁸¹ The language of duty first appeared in privity cases, which held that duty in a contractual undertaking ran only to parties to the contract.¹⁸² Duty was treated as an issue in negligence cases generally only in its absence, much as it would come to be treated in twentieth century cases, but for the opposite reason. In the early nineteenth century, duty was a non-issue because duty was self-evident in the limited pockets of negligence liability; in the late twentieth century duty was generally a non-issue because of the generalization of the duty of care. Late nineteenth century English treatise writers debated whether there was a unified, general duty of care or numerous situation-specific duties.¹⁸³ This question was resolved in principle by English courts in 1932 in *Donoghue v. Stevenson*,¹⁸⁴ which stated a general duty of care. Looking back over the development of the negligence action in English law, D.J. Ibbetson observed, “By around 1970 the law of negligence was beginning to be conceptualised in terms of an ocean of liability for carelessly causing foreseeable harm, dotted with islands of non-liability, rather than as a crowded archipelago [sic] of individual duty-situations.”¹⁸⁵ American negligence law evolved in the same

180. *Id.* at 48–49. The pre-nineteenth century precursors of the modern negligence cause of action are cases that impose liability for carelessly caused harm on people who are engaged in a public calling, who carelessly perform a specific undertaking, who violate a specific custom of care, or who are careless in the control of dangerous things. *Id.* at 41.

181. *Id.* at 49–51; see *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490; 3 Bing. (N.C.) 468 (frequently cited as an example of the expansion of negligence). Ibbetson reports that courts typically imposed negligence liability in a conservative, incremental fashion by analogizing to previously established cases of liability. Ibbetson, *supra* note 129.

182. *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402; 10 M. & W. 519. Winfield explains the decision is anticipated by *Langridge v. Levy*, (1837) 150 Eng. Rep. 863, which found a vendor of a defective gun liable on a theory of deceit to the son of the buyer, who was injured when the gun misfired. In *Langridge*, Baron Parke explicitly rejected the plaintiff’s effort to ground the claim on the broader principle of liability. *Id.* at 867. Pollock thought the result in *Winterbottom v. Wright* was due to the fact the plaintiff had not pled careless work. POLLOCK, *supra* note 103, at 449.

183. See Ibbetson, *supra* note 129, at 241–43, 260–63.

184. [1932] A.C. 562 (H.L.) (appeal taken from Scot.). The first clear affirmative statement of a general duty of care by an English judge is found in Brett’s statement in *Heaven v. Pender*, (1883) 11 Q.B.D. 503. Five years later in *Cann v. Wilson*, (1888) 39 Ch. 39, duty was stated in general terms in the course of holding a surveyor liable to a mortgagee for a negligent appraisal in a case involving pure economic loss. *Le Lievre v. Gould*, (1893) 1 Q.B. 491, backtracked by holding a surveyor not liable to mortgagees for inadvertently falsely certifying the building had reached a certain stage of construction. Brett (then Lord Esher) limited the duty he formulated in *Heaven v. Pender* to conduct creating a risk of physical harm. *Id.* at 497.

185. Ibbetson, *supra* note 129, at 264.

direction as English law over roughly the same period.¹⁸⁶ Two 1955 California cases have been described as “the California equivalent” of *Donoghue v. Stevenson*.¹⁸⁷

The generalization of duty is only part of the story of the rise of the negligence action in the twentieth century. As important is the erosion of major liability-limiting doctrines.¹⁸⁸ One important change already noted is the demise of a rule—associated with a requirement of privity—that negligence in performing contract is not actionable in tort by a non-party to the contract, even if the plaintiff’s loss is a predictable consequence of the defendant’s carelessness. Courts first eliminated the shield of non-privity in defective goods cases like *Donoghue v. Stevenson* and *McPherson v. Buick Motor Co.* Later cases gradually extended this to construction and services.¹⁸⁹

Also important is the erosion of rules of superseding cause, which absolves a defendant from liability to a plaintiff when the immediate cause of the plaintiff’s harm is the misconduct of a third party.¹⁹⁰ The Restatement

186. I could not find an American treatise espousing a general principle of duty. American authors who addressed the question gave up. For example, H. GERALD CHAPIN, *HANDBOOK OF THE LAW OF TORTS* 499 (1917), begins the discussion of negligence: “It is manifestly impossible to define this tort with any degree of exactness, since no fixed rule of duty can be established which will be applicable to all cases.” JOHN CHARLES TOWNES, *GENERAL PRINCIPLES OF THE LAW OF TORTS* (1907), shows some legal scholars continued to think of tort law as a body of law protecting private rights that did not depend on the assent of the person subject to the correlative duty. Townes relegates the treatments of discrete causes of action, including negligence, to a short appendix.

187. W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 673 (2008) (referring to *Hilyar v. Union Ice Co.*, 286 P.2d 21 (Cal. 1955), and *Warner v. Santa Catalina Island Co.*, 282 P.2d 12 (Cal. 1955)).

Reflecting the current position of American law, *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* § 7 (2005) states a general duty of care: “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” The original reporter, Gary Schwartz, thought the concept of duty could be relegated to the margins. *RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES* (Preliminary Draft No. 1, 1998), stated negligence as a rule of liability for negligent conduct resulting in physical harm with no mention of a predicated duty. Schwartz assigned the concept of duty to the margin, referring to “no duty” rules that limited liability based on considerations of principle or policy. *Id.* § 16. The general duty rule in § 7 was added in response to objections to Schwartz’s attempt to excise duty from the center of the law of negligence.

188. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

189. See, e.g., *Bush v. Seco Electric Co.*, 118 F.3d 519 (7th Cir. 1997) (applying Indiana law and describing the gradual displacement of the “accepted work doctrine,” which absolved a contractor of liability for accepted work, by a rule of liability for harm foreseeably resulting from careless work).

190. *Meyering v. General Motors Corp.*, 275 Cal. Rptr. 346 (Cal. Ct. App. 1990), is a wonderful window into this story. The plaintiffs were injured when youths threw chunks of concrete from an overpass crushing the roof of their car. They sued GM arguing the car roof was defectively weak. The trial court rejected the claim. A divided court of appeals reversed, noting that GM’s position “anachronistically recalls a view long rejected by California courts as well as most other jurisdictions . . . that an intervening criminal act is by its very nature a superseding cause.” *Id.* at 348–49. The majority opinion provides a good review of California cases pointing in this direction. The dissent tries to breathe life into the doctrine by arguing there was a special relationship in those cases. The California Supreme Court took the case for review and then dismissed it. This left the result standing but meant the decision could not be cited as authority. See *Meyering v. Gen. Motors Corp.*,

(Third) of Torts: Liability for Physical and Emotional Harm reduces the remnants of superseding cause to situation-specific applications of a general rule holding an actor liable if the risk of the intervening conduct is among the risks that make a defendant's conduct negligent, or to policy-based exceptions to the general rule.¹⁹¹ The cumulative effect of these developments is to open the door to negligence claims for conduct that no one would have thought actionable as recently as fifty years ago. Striking recent examples are negligent marketing claims against suppliers of snub-nosed guns and exploding bullets by crime victims.¹⁹²

During the latter half of the twentieth century courts began to entertain negligence claims for "pure" emotional disturbance and "pure" economic loss, meaning emotional disturbance or economic loss that is unconnected to physical harm to a claimant's person or property. The California Supreme Court led the way in both areas, applying an open-ended balancing test to determine if liability is appropriate for carelessly caused harm.¹⁹³

The pendulum swung back in the 1980s. Today, most everywhere in the United States, including California, there are general rules barring liability for

804 P.2d 1301 (Cal. 1991) (granting review); *Meyering v. Gen. Motors Corp.*, 819 P.2d 842 (Cal. 1991) (dismissing review).

191. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 (2005).

192. See *McCarthy v. Olin Corp.*, 119 F.3d 148 (2nd Cir. 1997); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001).

193. *Bikanja v. Irving*, 320 P.2d 16 (Cal. 1958), holds an intended beneficiary of a will has a claim in negligence against a notary who was practicing without a license when the notary's failure to have the will properly attested defeats the claimant's bequest. Justice Gibson used a balancing test to justify the liability. The test does not distinguish claims for solely pecuniary harm from claims for physical harm:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 19.

Over the next quarter century the California Supreme Court used the *Bikanja* balancing test to reach various conclusions. See *J'Aire Corp. v. Gregory*, 598 P.2d 60, 66 (Cal. 1979) (holding that a construction contractor owes a duty of care to a tenant to work promptly when dilatory work results in lost profits to the tenant); *Barrera v. State Farm Mut. Auto. Ins. Co.*, 456 P.2d 674, 681 (Cal. 1969) (holding that a liability insurer owes a duty of care to the victim of its insured's negligence that precludes denying a claim for benefits on the basis of the insured's misrepresentation when the insurer was negligent in issuing the policy); *Connor v. Great W. Sav. & Loan Ass'n.*, 447 P.2d 609, 617-18 (Cal. 1968) (holding that a lender owes a duty of care to home buyers to ensure a thinly capitalized developer does not build defective homes); *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961) (holding that an attorney owes a duty of care to the intended beneficiary of a will). At the time *J'Aire* seemed a signpost of greater things to come. Rabin, *supra* note 8, at 1534, concludes that pure economic loss is treated differently in tort only if it would subject an actor to liability for widespread harm that is disproportionate to the actor's fault. *J'Aire* and *Bikanja* are keystones in Professor Rabin's legal argument. *Id.*

pure economic loss, subject to narrow exceptions.¹⁹⁴ There also is a push to limit the reach of the negligence principle in cases involving physical harm.¹⁹⁵

Turning from law to theory, one finds a remarkable degree of consensus about the analytical structure of the core of negligence law. Much of modern negligence law can be reduced to a simple principle—a plaintiff has a prima facie claim for compensatory damages against a defendant whose unreasonable conduct harms the plaintiff, so long as the risk of such harm is among the risks that make the defendant's conduct unreasonable.¹⁹⁶ The principle is descriptively accurate if its scope is limited to traditional negligence cases involving physical harm with no abnormal intervening human conduct. The principle does not purport to resolve the central normative questions, which go to whether and why a defendant's conduct is unreasonable. The principle does help to frame normative questions by isolating them from factual questions and focusing the presentation and analysis of the claim. But the openness and flexibility of the concept of reasonableness leaves a decision maker free to resolve the normative questions based on whatever values the decision maker thinks relevant in a situation. Disagreements about the goals of negligence law, and how to weigh those goals when they conflict, can be resolved case by case by a jury or situationally by a court.

The negligence principle is similar to classical theories of contract in some respects. Both are value neutral: People may use contract to pursue almost any end they desire. The negligence principle queues up the question of whether an actor unreasonably caused a loss, while leaving value judgments to the court or the jury. Both principles appeal to strong moral intuitions: Most people would agree the law should facilitate private ordering. Most people also would agree people should avoid carelessly harming others. Both principles can be justified on familiar economic grounds. And both principles generate a surrounding apparatus of technical concepts that make them feel appropriately law-like.

Notwithstanding these similarities, there are profound differences between the negligence principle and classical theories of contract. Classical theories

194. See *supra* note 2 and accompanying text.

195. See Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 290–323 (2006) (documenting and decrying the proliferation of situation-specific no duty determinations by California courts).

196. Often the principle is expressed in terms of an actor generally owing a duty of reasonable care if his conduct creates a risk of harm. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997); *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998). The Restatement (Third) states this as a duty rule: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (2010). Section 6 states the corollary liability rule: "An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable." *Id.* § 6. A comment to section 6 notes the equivalence of the two propositions. *Id.* § 6 cmt. f.

conceive of contract as a means to enable people to determine amongst themselves the rights and obligations they owe one another. The negligence principle empowers courts to make this determination. Another difference follows. Classical theories of contract tend to create a “perfect circle” of obligation that defies expansion or penetration because it seeks to ground obligation on a sufficient expression of mutual will.¹⁹⁷ The ideal of private legislation animating the core of contract acts as a powerful check on what duties and obligations can be described or justified as contractual. There is no comparable check on the scope of negligence, for the negligence principle is open ended. A principle of liability for harm carelessly caused is what courts make of it. As Bill Powers has observed, extended to its limits, the negligence principle would displace much of tort and contract law.¹⁹⁸ To preserve other bodies of law, negligence must be kept in its place. But what is its place?

C. Critics of the Dominant Theory of Negligence

John Goldberg and Benjamin Zipursky have spent much of the last two decades building a case against the dominant theory of negligence and crafting an alternative. The target of their criticism is a theory that permits courts to base liability for carelessly caused harm on an all-things-considered judgment that privileges the regulatory effects of liability. They argue that this dominant theory oversimplifies negligence law by obliterating fine-grained, situation-specific rules that define to whom an actor owes a duty of care and the consequences for which an actor is responsible. They criticize the effort to subsume doctrines of superseding cause into the general negligence principle, taking the position that this runs “roughshod over standard ways of understanding responsibility [and] may even threaten to undermine the particular notion of wrongdoing that forms the core of tort law.”¹⁹⁹

Goldberg and Zipursky worry that obliterating fine-grained rules of duty and responsibility makes negligence liability less certain and predictable and gives judges and juries undue discretion. They criticize the simplification of negligence law in California in particular as depriving duty of “all of its texture and shape, thereby functioning as a blank check” empowering both progressive and conservative judges to pursue their own policy goals and “overstep[] their proper role.”²⁰⁰ Goldberg and Zipursky also worry the dominant theory effaces

197. See Percy H. Winfield, *The Restatement of the Law of Torts—Negligence*, 13 N.Y.U. L. Q. Rev. 1, 15 (1935) (“Contract was the perfect circle that must be marred by no indentation or protuberance.”). Winfield is referring to *Winterbottom v. Wainright* and its ilk.

198. See William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209 (1994).

199. John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1244 (2009).

200. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 334, 335 (2006).

the inner morality of negligence law, which they believe grounds on ordinary ideas of the moral obligations that inhere in our relations to others. Thus they object to reducing the duty question in negligence law to an “all-things-considered” policy judgment, on the ground that this denies the concept of duty its special normative quality, which they describe as “relational” and as “duty in its obligation sense.”²⁰¹ Broadening their focus to all of tort law, Goldberg and Zipursky argue the distinct characteristic of tort law is that rules of conduct in tort are moral directives.²⁰²

If one looks at cases at the core of negligence law (i.e., cases involving direct physical harm), then the difference between the Goldberg-Zipursky theory and the dominant theory merely lies in how each theory frames the negligence inquiry. In particular, if the fact that an actor’s conduct creates an apparent risk of physical harm to a person in the plaintiff’s situation suffices to create a “relational” duty of care owed by the actor to a person such as the plaintiff, then the Goldberg-Zipursky approach collapses into the dominant approach. One may preserve difference between these approaches by particularizing the relevant duty-creating conduct and the relevant risk, but the results of such conceptualization often seem to beg the question.²⁰³

The difference between the Goldberg-Zipursky approach and the dominant theory of negligence is clearer if one looks outside the core of negligence law to cases still within the conventional periphery of the negligence action. An example is a claim of “social host liability” by a victim of a drunk driver against a host who plies the drunk with alcohol at a party, knowing the drunk might drive afterwards. A half-century ago this would have been dealt with as a problem of superseding cause. Today it often is described as an example of an “enabling tort” (though this really is a “disabling tort”). If the drunk takes to the road and injures someone as a result of careless driving, then the innocent victim of the drunk has a *prima facie* negligence claim

201. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 733 (2001).

202. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006).

203. See Dilan A. Esper & Gregory C. Keating, *Putting Duty in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225 (2008); Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 (2006). The approaches collapse if the duty-creating conduct is described generally as inviting travelers to wait on a railroad platform as trains come and go, and the risk is described generally as the risk created to people on the platform in allowing people to try to board a moving train. See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). When one particularizes the risk and duty in terms of the harm to Palsgraf from being hit by a scale knocked over by an explosion of a package dropped by a passenger who was being helped to jump aboard a departing train, the incident seems freakish. The argument for the approach taken in the Restatement Third is that we can do no better in such freakish accidents than to put to the jury the general question whether the harm to the plaintiff was among the risks that made the defendant’s conduct unreasonable.

against the host under the dominant theory.²⁰⁴ Indeed, if the logic of modern negligence theory is strictly followed, then the drunk has a prima facie negligence claim against the host for damages, which would be reduced based on the drunk's degree of responsibility.²⁰⁵ Goldberg and Zipursky observe that courts routinely reject claims of social host liability even when the claimant is an innocent victim. They argue this is best explained by a widely held moral view that an adult who chooses to drink and drive bears sole moral responsibility for the consequences, both to himself and to other victims of his choice to drive drunk.²⁰⁶

I do not read Goldberg and Zipursky to be arguing that a rule of no social host liability is required as a matter of legal doctrine or morality. This is inconsistent with their general philosophical stance, which they describe as "pragmatic conceptualism."²⁰⁷ I think their position is more subtle. Narrowly stated, they claim there just is a legal rule of no social host liability and this rule is justified by a widely shared moral view that a drunk driver bears sole moral responsibility for the consequences of his actions. The first (and legal) half of the narrow claim grounds on a preference for deciding cases by narrow rules rather than by general rules, and on a view that courts should change law incrementally. The second (and moral) half of the narrow claim grounds on a broader claim about what they take to be the distinctive feature of tort law. They claim tort law embodies and enforces moral norms of conduct "grasped by members of the community in such a manner as to guide conduct and generate expectations."²⁰⁸ A social host who serves alcohol to a drunk commits no tort because as a social fact there is no moral norm of conduct against serving alcohol in a social setting even to a person who is visibly intoxicated, or at least no moral norm of conduct in which the felt moral obligation runs to potential victims of the guest should he drive afterwards.

Goldberg and Zipursky accept that legal doctrine and moral norms of conduct are fluid and often are inconclusive. They also accept that judges can influence moral norms of conduct through the power to make tort law. They put two constraints on the fluidity and open-endedness of tort and negligence law. One constraint is doctrinal incrementalism. They want courts to work within or

204. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (2005) recognizes this and takes the position that the absence of social host liability is best explained as a special no duty rule. Section 29, comment e, argues that the absence of social host liability is best explained as a no duty rule and not as an application of the principles on scope of liability, for duty is an issue for the court while scope of liability is an issue for the jury. *Id.* § 29 cmt. e.

205. The logic is not followed to this extreme. Drinking companions have had some luck obtaining reduced damages based on the comparative fault of a dramshop. *See, e.g., Baxter v. Noce*, 752 P.2d 240 (N.M. 1988).

206. *See* Goldberg & Zipursky, *supra* note 199, at 1225–29.

207. *See* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

208. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 976 (2010).

at the margins of existing doctrines such as superseding cause. I will call the other constraint moral prescriptivism. They want judges to think more about morality—specifically moral rules of conduct—and to think less about policy in deciding if conduct not within an established rule of tort law is tortious. Being a bit more precise, they argue a judge should hold *A*'s action *x* causing harm *y* to *B* is a tort by *A* against *B* only if *A* reasonably should understand (or perhaps reasonably could understand)²⁰⁹ that action *x* is a moral wrong against *B* with respect to *y*.²¹⁰ Thus they say true strict liability for a socially approved but abnormally dangerous activity sits uneasily in tort law because such an activity by definition violates no moral rule of conduct.²¹¹ For Goldberg and Zipursky, a widely held belief that *A* is morally obligated to rectify the harm is not enough for tort liability. There must be a widely held belief that *A* has a moral obligation to *B* not to do *x*.

Robert Stevens is another important critic of the dominant theory of negligence. He writes from an English perspective. Stevens sets as his target a conception of tort law as the body of law that protects against harm inflicted without a good reason.²¹² This is the dominant theory of negligence expanded into a theory of tort law. He offers in its place a theory of tort law as a body of law that protects rights. According to Stevens, some of the rights tort law vindicates are rights a person has against the world, including “[r]ights of bodily safety and freedom” and “[r]ights of property.”²¹³ Notably, economic expectancies not tied into personal and property rights are not rights a person may assert against the world.²¹⁴ Other rights arise from a duty voluntarily undertaken by an actor and are good only against the actor who undertakes the duty.²¹⁵ According to Stevens, these duties can arise by contract or by a voluntary undertaking that bears a family resemblance to contract.²¹⁶ Stevens places the liability for negligent misstatement in this family.²¹⁷

Like Goldberg and Zipursky, Stevens objects to the open-endedness and generality of the negligence principle, and to the invitation to instrumental policy-based reasoning. His objections and solution are a bit more extreme. Stevens argues the better view is there is no such thing as the negligence

209. Tying tort liability to the violation of existing and fairly concrete moral rule of conduct is a fairly strong brake on negligence liability. Tying it to a plausible moral rule of conduct is a weaker brake. But it remains somewhat of a brake. *See infra* Part V.

210. Goldberg & Zipursky, *supra* note 208, at 945–47.

211. *Id.* at 951–52.

212. *See* STEVENS, *supra* note 90, at 1–3. The statement in text oversimplifies a bit. In Stevens's own words “The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.” *Id.* at 2.

213. *Id.* at 5.

214. *See id.* at 5–8.

215. *See id.* at 9–10.

216. *See id.* at 11.

217. *See id.* at 33–35.

action.²¹⁸ Stevens links the negligence action to what he calls the “loss-based model of torts” and to policy analysis, which invites a judge “to weigh the policy factors which militate in favour of and against liability.”²¹⁹ He argues this model of tort law is wrong-headed because judges lack the political and technical capacity to make policy decisions and because it makes the law indeterminate.²²⁰ Stevens’ views on the law are not as antediluvian (the flood being legal realism) as this brief description might make them seem. He acknowledges that tort law changes as courts make or reshape rights.²²¹ He limits what courts may do under the flag of protecting rights by insisting rights protected through tort law must be generalizable and specifiable such that “rights others have against us are capable of being determined in advance.”²²² According to Stevens, there can be no “general right not to be carelessly caused loss or harm, with its boundaries determined by a rich array of policy concerns.”²²³ It is impossible for people to determine in advance when they will be held to have infringed upon this right.

Stevens, Goldberg, and Zipursky react to what they see as legal realism’s pernicious effects on tort law and negligence law and the related turn by legal theorists and some judges to economic reasoning. Stevens is English so he can hope to find a haven from modernity in legalistic, rights-based reasoning. Goldberg and Zipursky are Americans so they see no haven there. They look for a haven instead in legal doctrine and in morality, both of which they treat as social facts. All recognize the fragility of these havens so they add formal constraints. For Stevens, a right must in form be generalizable and specifiable such that a person can determine in advance what claims of rights others might make against him. For Goldberg and Zipursky, tort must ground in a moral norm in the form of a “thou shalt not” command.

Their accounts of tort law would have been spot on as a descriptive matter more than a century ago. Most nineteenth century accounts of tort law organize it, as Stevens does, around personal and property rights and correlative wrongs. In the nineteenth century, negligence liability existed only in cases in which a defendant “put himself in a position in which any sensible man would act carefully.”²²⁴ A commonly felt moral obligation was an antecedent to legal liability for carelessly caused harm. But this is history. Goldberg, Zipursky, and Stevens are going against the strong current in American negligence law.

218. *Id.* at 291–97 (explaining Stevens’s interpretive analytical argument for why this is so).

219. *Id.* at 307.

220. *See id.* at 308–12.

221. *Id.* at 315.

222. *Id.* at 339.

223. *Id.*

224. Winfield, *supra* note 179, at 48. Courts rarely spoke of duty in negligence cases in the nineteenth century. Duty was a matter of common morality. *Id.*

Nevertheless they supply compelling reasons to keep negligent misstatement apart from general negligence. These revanchist theories of negligence increase in descriptive power as one goes farther from the core. Stevens is right: Negligence liability for pure economic loss is the exception and not the rule. In addition, in most cases in which there is liability, it can be explained based on a breach of a duty voluntarily undertaken by a defendant. Goldberg and Zipursky are right: The best explanation for liability in many of these cases is a venerable moral intuition that inviting reliance entails a duty of care.

The worries about the open-endedness and generality of the negligence principle also weigh heavily in favor of maintaining distance between the doctrines. Treating negligent misstatement as a problem of general negligence makes the limitations on the negligent misstatement described in Part I seem ad hoc and incoherent. Treating negligent misstatement as a problem of contract makes it possible to organize these features of the action around the simple moral intuition that inviting reliance entails a duty of care. Two other reasons stressed by Goldberg, Zipursky, and Stevens favor treating negligent misstatement as a problem of contract, with the gist of the claim being invited reliance, rather than as a problem of general negligence. Specific rules are preferable to more general rules because the greater specificity makes the law more certain and predictable. Long-established, specific rules are preferable to more general rules because longevity provides some evidence of the soundness of the rules.

IV.

CODA: ECONOMIC NEGLIGENCE IN THE TWENTY-FIRST CENTURY

Having linked my case to the positions of Goldberg-Zipursky and Stevens, I now want to distance myself from some aspects and implications of their assaults on the dominant theory of negligence.

I begin with Stevens because the clarity of his position makes him an easier target. Stevens is wrong as a descriptive matter when he disdains instrumental and economic explanations for the limits on the reach of negligence law.²²⁵ Often the absence of negligence liability is best explained in

225. Stevens argues that policy arguments are makeweights and the real reason for denying liability in these cases is that there can be no right to be free of carelessly caused, purely economic harm, because deciding when there should and should not be liability for infringement of such a right would require courts to make numerous difficult policy judgments. STEVENS, *supra* note 90, at 339. This is an argument about what reasons ought to matter, not an argument about what reasons do matter. Goldberg and Zipursky concede that legal wrongs may diverge from moral wrongs for many reasons, including instrumental reasons and policy. Goldberg & Zipursky, *supra* note 208, at 947–53. In other words, they take the position that a breach of a moral norm of conduct is a necessary but not sufficient condition for tort liability.

precisely these terms.²²⁶ There are many no-liability cases in which most people would agree that a defendant committed a moral wrong against a plaintiff, for which the defendant morally ought to make amends. The law does not impose liability for nakedly—some would say offensively—prudential and policy reasons, despite the dictates of ordinary morality. A claim may be denied, even though the result seems unjust in a specific case, because of the need for a bright-line rule, and because of concerns for the cost and risk of error in processing similar claims in future cases.²²⁷ If negligence law determines the matter (happily it probably does not), then BP's legal liability for the harm caused by the Deepwater Horizon blowout will compensate only a miniscule part of the harm for which most people think BP is morally responsible and ought to make amends.

Stevens also is wrong as a descriptive matter when he argues liability for carelessly caused pure economic loss requires a voluntary undertaking.²²⁸ There are exceptions to the general no-duty and no-liability rules that cannot be explained straightforwardly on this basis. The most familiar examples come from the law of public nuisance and involve claims such as those of fishermen who are deprived of their livelihood by negligent destruction of fisheries.²²⁹ Less familiar are cases imposing a duty on a seller's broker to use care in inspecting property and to warn a buyer of defects.²³⁰ And some cases hold a

226. For an extensive response to Goldberg and Zipursky along these lines see Stapleton, *supra* note 203. See also Robert L. Rabin, *The Duty Concept in Negligence: A Comment*, 54 VAND. L. REV. 787 (2001).

227. The need for drawing an administrable line is precisely the reason given by a majority of the en banc Fifth Circuit in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), for limiting recovery to commercial fishermen after a toxic spill shut down fisheries and an important waterway on the Mississippi for almost a month.

228. STEVENS, *supra* note 90, at 33–37, 42–43.

229. The right of commercial fishermen to recover is well established. See, e.g., *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980) (applying New Jersey law); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156 (10th Cir. 1974) (applying Utah law); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981), *aff'd en banc*, 752 F.2d 1019 (5th Cir. 1985); *Potomac River Ass'n v. Lundeberg Md. Seamanship Sch., Inc.*, 402 F. Supp. 344 (D. Md. 1975) (applying Maryland law); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973) (applying Maine law); *Carson v. Hercules Powder Co.*, 402 S.W.2d 640 (Ark. 1966); *Connerty v. Metro. Dist. Comm'n*, 495 N.E.2d 840 (Mass. 1986); *Hampton v. N.C. Pulp Co.*, 27 S.E.2d 538 (N.C. 1943). Some cases allow non-fishermen to recover when they suffer a similarly distinct injury. *Hardy Salt Co.*, 501 F.2d, allows a claim by a salt company that extracted sodium chloride from the lake as well as a claim by fishermen when the defendant fouled the lake. *Conley v. Amalgamated Sugar Co.*, 263 P.2d 705 (Idaho 1953), allows a store to recover for business lost due to the noxious odor of beet pulp the defendant released in a stream.

230. See *Easton v. Strassburger*, 199 Cal. Rptr. 383, 390–91 (Ct. App. 1984); *Berryman v. Riegart*, 175 N.W.2d 438, 442–43 (Minn. 1970); see also Diane M. Allen, Annotation, *Real-Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold*, 46 A.L.R.4th 546 (1991) (collecting other cases).

drug tester hired by an employer to screen employees owes a duty of care to the employees.²³¹

Turning to Stevens' normative argument, I believe he goes too far in arguing that regulatory decisions *always* are best left to legislatures and regulatory agencies because courts lack political and technical competence to decide. Part of my disagreement with Stevens on this key point is cultural. American lawyers are more comfortable than English lawyers with judges making policy decisions and with the idea of judicial legislation. But the disagreement goes beyond this. A worry about the competence of courts may be reason for inaction on close policy questions (this is a point American courts endlessly debate), but it is not reason for inaction on easy policy questions if the tools of civil litigation are capable of redressing the conduct and harm in question. The openness and flexibility of negligence law as a regulatory tool make it uniquely capable to deal with unreasonable harmful conduct that is unanticipated by forward-looking legislative and regulatory bodies. Common law courts have the advantages of being able to act with hindsight and with the power to impose liability retroactively. Sometimes dog law is the best we can do.

The Goldberg-Zipursky program of doctrinal incrementalism and moral prescriptivism avoids some of these descriptive and normative objections. It leaves courts with a fair amount of power to create new causes of action and liability rules. The constraint of doctrinal incrementalism is satisfied so long as a court is able to craft a cause of action or a liability rule in a way that does not unsettle existing law to an undue degree. For example, a court could provide an employee who is fired as a result of a false positive on a drug test a cause of action against the drug tester. There is no settled rule immunizing a drug tester from liability to an employee. It is just that existing tort rules do not reach this sort of carelessness. It would unsettle the law if a court took the position that the liability of a careless drug tester was an application of a more general principle making carelessly caused harm actionable. It would radically unsettle the law if a court went so far as to say a principle making carelessly caused harm actionable requires putting a claim to a jury whenever reasonable people might disagree whether a defendant's conduct was unreasonable. But the negligence principle need not operate in these ways. Outside the core of negligence, it may do its work in the background, helping to organize a field of law and guide courts as they cultivate the field.

231. See, e.g., *Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215 (Pa. 2003); *Duncan v. Afton, Inc.*, 991 P.2d 739 (Wyo. 1999); see also Amy Newnam & Jay M. Feinman, *Liability of a Laboratory for Negligent Employment or Pre-Employment Drug Testing*, 30 RUTGERS L.J. 473 (1999) (advocating allowing the action on the general view that redress for negligence resulting in solely pecuniary harm should be denied only if there is a specter of indeterminate liability); Catalano, *supra* note 12 (collecting cases on both sides of the point as well as cases addressing other theories of liability, including defamation).

The constraint in moral prescriptivism depends on what precisely one makes of a requirement that *A*'s action *x* causing harm *y* to *B* is a basis for tort liability only if *x* is a moral wrong by *A* against *B* with respect to *y*. A hard constraint requires for tort liability that most people in *A*'s position actually think *x* is a moral wrong by *A* against *B*. This prevents tort law from reaching carelessness in the use of new technologies for which moral norms of conduct have not yet developed. It also prevents tort law from redressing carelessness causing remote temporal or physical harms. Felt moral obligations tend to run to people and outcomes close in time and space to the conduct in question. A categorical rule that would prevent tort law from reaching this sort of conduct, even if the conduct clearly is unreasonable in retrospect and even if tort liability is an effective way to deter the conduct or redress the harm, is a stiff price to pay.

Perhaps Goldberg and Zipursky have a softer constraint in mind. They are unclear on this key point. One possibility is a rule that *A*'s action *x* harming *B* may be treated as a tort only if most people, after being educated about the conduct and harm and having a chance to reflect, would conclude *x* is a moral wrong by *A* against *B*. A variation is to require a moral judgment be embedded in and consistent with moral norms that are accepted as a basis for obligation in tort. Yet another possibility is a rule that *A*'s action *x* harming *B* may be treated as a tort only if most people agree the proposition "*x* is a moral wrong by *A* against *B* with respect to *y*" is sensible.

The differences between softer forms of moral prescriptivism and the most attractive alternative approach to assessing novel claims of negligence liability might be fairly small. The alternative acknowledges that courts have the power to create a cause of action or liability rule under the umbrella of negligence, based on an "all-things-considered" assessment of the unreasonableness of an actor's conduct, the vulnerability of a plaintiff to the conduct, the efficacy of civil litigation as a mechanism to deter the conduct and redress the harm, and the unsettling effect on existing rules of allowing the claim.²³² The question "On reflection, could *A*'s action *x* harming *B* be considered a moral wrong by *A* against *B*?" often is an effective short-hand way of getting at several of the criteria of the all-things-considered assessment. A factor this assessment conspicuously omits is the efficacy of civil litigation as a mechanism to deter the conduct and redress the harm in question. Goldberg and Zipursky address this omission by allowing courts to absolve actors from liability for moral wrongs on such prudential grounds.

232. Jane Stapleton has done the most to develop this approach in a systematic way. See Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable*, 24 AUSTL. B. REV. 135 (2003); Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory"*, 50 UCLA L. REV. 531 (2002); see also Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss*, 48 ARIZ. L. REV. 749, 763–71 (2006).

This brings me back to the United Airlines incident, for it illustrates the convergence of moral prescriptivism and all-things-considered policy-focused judgment. My candidate for the individual who bears the greatest responsibility in the incident is the employee at Income Securities Advisors who passed on the misdated story reporting United's bankruptcy without reading it. The employee found the story in an early morning Google search. The conduct is remarkably careless looked at in a narrow frame. Even a moment's reflection on the headline would raise a red flag, for one would expect such news to be all over the web. It is impossible to imagine the employee personally acting on the headline without reading the story. Indeed, it would be odd for the employee to pass on the story to a friend as newsworthy without reading it first.

If we broaden the frame in which we evaluate the employee's conduct, then it becomes clear that while the conduct may have been careless, it is not a moral or legal wrong by any standard. Demanding greater care requires the employee take more time to verify every questionable bit of news, not just this one bit. The employee may expect other people down the line to verify questionable news before they act on it. If the victims are vulnerable, then it is because they prefer a rapid response to a considered one on new information regarding the value of publicly traded securities. The loss is only money and it is borne by people and institutions with the financial wherewithal and acumen to move vast sums of money in a moment. If we asked people, "Did the employee at Income Securities Advisors violate a moral duty he owed to stock traders to verify questionable news before passing it on?" I expect they would answer "No" for reasons like these.

But even softer forms of moral prescriptivism may demand too high a price in limiting the potential reach of negligence law.²³³ Partly this is for the familiar reason that, as society becomes more complex, conventional morality—particularly the type embodied in the common law—has less to say about what is appropriate human behavior. A calculus of the public interest

233. Even the softer forms of moral prescriptivism cut against the grain of modern tort law and negligence law. Goldberg and Zipursky note their theory of tort law would preclude strict liability for abnormally dangerous activities because people generally do not think a person who engages in a socially useful but unavoidably dangerous activity such as using explosives in construction is committing a moral wrong. Goldberg & Zipursky, *supra* note 208, at 951–52. Under the Goldberg-Zipursky position, a widely held moral view that there is a duty to compensate victims of one's conduct is not a basis for obligation in tort. Their theory also would preclude strict tort liability on a basis of respondeat superior or enterprise liability. *Id.* at 952 n.177. Additionally, it would preclude tort liability for defective products in cases of unavoidable manufacturing defects and in cases of design defects that are unavoidable given the state of the art at the time of the design.

This is not to say that their theories of torts as the body of law that vindicates legal rights or that redresses moral wrongs are wrong-headed. It often is the case that the best account of a core of a field of law misstates the periphery. Classical theories of contract and the dominant modern theory of negligence both have this property in their respective fields. It could be that the Goldberg-Zipursky or Stevens theory of torts best describes tort law as a whole, though their theories unnecessarily complicate the core of negligence law. But it is unlikely that their theories, or any theory, fully capture the field.

then becomes more important. But this is not enough. As Justice Brandeis argues in *INS v. AP*²³⁴ in making this point, this may be a reason for courts to turn the work of crafting new liability rules over to legislative and administrative bodies. The common law's unique value lies in the ability of courts to evaluate conduct in hindsight and impose liability retroactively. Often when liability is imposed retroactively based on a hindsight judgment that conduct is unreasonable or otherwise inappropriate, no one would think the actor did something morality forbids. This is particularly true in the case of carelessness in the use of new technologies and of consequences remote in time or space from conduct. If morality comes into it at all, then it is in the form of a judgment that an actor is obligated morally to make amends for harm his conduct causes.

A controversial Australian case, *Perre v. Apand Proprietary Ltd.*,²³⁵ illustrates. The case bookends the United Airlines incident. It is a novel claim for pure economic loss that might well be justified under an all-things-considered judgment even though there is no tincture of invited reliance or of a voluntary undertaking. Apand sold infected seed potatoes to the Sparsons, causing them to lose a crop to bacterial wilt.²³⁶ While the wilt did not spread to neighboring farms, a prophylactic health and safety regulation barred the neighbors, including, Perre from selling their potatoes into a lucrative market for five years.²³⁷ As a result, Perre lost valuable contracts.²³⁸ Australia's highest court allowed the claim. Many of the judges emphasized the vulnerability of the plaintiff, the strong proof of causation, and the absence of indeterminate liability.²³⁹ Their statements of the facts make it clear that Apand's conduct was quite careless. Apand had taken the seed potatoes out of a certification program that would have ensured against wilt. The seed potatoes were grown in an area with a high risk of wilt. And Apand knew that an outbreak of wilt would result in a prophylactic bar on the export of all potatoes in the area.²⁴⁰

Stevens' theory of tort would preclude liability in the case. Goldberg and Zipursky are unclear about the specific content of their requirement that tort liability ground in violation of a moral duty, so it is hard to say how their theory would apply in the case. But the case poses a hard problem for their theory. If they concede the requisite moral duty might be found on these facts, then their theory has no teeth to it, for it will be possible to find a moral duty in

234. 248 U.S. 215, 262 (1918) ("The unwritten law possesses capacity for growth Where the problem is relatively simple . . . it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple.").

235. (1999) 198 CLR 180 (Austl.).

236. *Id.* at 237–39 (Gummow, J.).

237. *Id.* at 239.

238. *Id.*

239. *Id.* at 218–20 (Gleeson, C.J.); *id.* at 285–86 (Gummow, J.).

240. *Id.* at 257–58 (Gummow, J.); *id.* at 287–89 (Kirby, J.); *id.* at 298–99 (Hayne, J.).

every case in which liability is justified on a mixture of policy grounds and an ex post judgment that it is fair to make defendants pay for the harm they carelessly caused. If their theory precludes liability on these facts, then it comes at too high a price.

CONCLUSION

We should think of the modern theory of negligence as akin to classical theories of contract. Both are theoretical constructs that began as descriptive enterprises but came to reshape the law the theorists sought to describe. Why theoretical accounts of the law exert such an influence on the law courts apply is an interesting question. Part of the reason is that the theories brilliantly capture the core of the bodies of law they seek to describe. In the law, descriptively powerful theories take on normative power. Part of the reason may be that the theories capture something about their times. Both theories are value neutral. Contract is agnostic about its uses. Negligence is agnostic about what makes conduct unreasonable. Both theories are empowering. Contract empowers private ordering. Negligence empowers courts to redress harm carelessly caused. Negligence leaves it to courts to decide what conduct the law will treat as careless. The push back against the modern theory of negligence recognizes that such a principle of law is untenable. Stevens believes it is wholly untenable. Goldberg and Zipursky would tether negligence by requiring that courts extend the reach of negligence incrementally and by tying negligence to ideas of moral obligation. I have argued for a more moderate course: Generally confine the negligence principle to its traditional field, which is liability for more or less directly caused physical harm. Treat negligent misstatement as a problem of contract akin to a promissory estoppel alongside other liabilities based on invited reliance. We might call this body of law *assumpsit*. But create a legal space for a general claim of negligence. We might call it the action on the case.