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NEGLIGENT MISREPRESENTATION AS CONTRACT

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This article argues negligent misrepresentation is best understood as a contractual claim akin to promissory estoppel with its gist being invited reliance. This taxonomic claim may seem hopeless for the problem is treated as one of tort in the United States and everywhere else in the common law world. I argue this is an unfortunate byproduct of classical theories of contract and the idealization of contract as private legislation. It 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 negligent misrepresentation will be subsumed into a general tort of negligence. This will change the nature of the liability in significant ways that ought not be allowed to happen as a byproduct of classification of the claim as a species of negligence.

This article also is a history of legal theory and arguments about the best theories of contract, tort, and negligence. A long and broad view on these arguments highlights a phenomenon that theorists who focus on a specific field generally overlook. The best theory to account for the core of a field of law generally does a poor job of explaining the periphery. Modern variations on classical theories of contract, such as a promise-based theory, brilliantly account for the core of contract law. The theory of negligence as liability for harm carelessly caused brilliantly accounts for the core of negligence law. But both theories fail in explaining the periphery of their respective fields of law. The negligence principle is too general and open-ended and it unhelpfully effaces the morality of the common law. Promise-based theories of contract are too parsimonious and constrictive. They tend to reduce contract to perfect circle of private legislation. Treating negligent misrepresentation as a problem of contract pushes back against both of these tendencies.

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I. INTRODUCTION AND OVERVIEW

On Monday morning, September 8, 2008, shortly before the New York Stock Exchange opened at 9:30 AM, 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. Over the next 37 minutes United's share price dropped from \$12.30 per share, its close on Friday, to around \$3 when trading was halted. After United assured the world it had not filed for bankruptcy trading in the stock resumed at 11:30 at \$10.92 per share. As best we know the seeds for the false report of United's financial demise were planted shortly after midnight east coast time Sunday when someone clicked on an archived news article about United's 2002 bankruptcy on the web site 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. A Google program, called a spider, which skims the internet for news stories around every 15 minutes, found the listing and followed it to the archived news article, which had no date. The program filled in the date atop the web page, which was September 6, 2008. 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 surprising alarming information about a large company to a news service without checking its accuracy. An employee of Bloomberg carelessly broadcast the information

¹ The facts are taken from How a Chain of Mistakes Hurt Shares of United, New York Times (Sept. 15, 2008). Bernhard Warner, Robots take their toll on financial markets, Times Online (Sept. 10, 2008), differs 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 promulgation by the SEC of model rules. See Securities Exchange Act Release No. 60706 (Sept. 22, 2009).

without checking its accuracy. One might fault the people at Google who designed a search engine that could misdate newsworthy information it compiles. While people were careless it is clear no one is legally liable for the resulting losses. In almost every American state a negligence claim is barred by the economic loss rule.² A claim for negligent misrepresentation is barred by a rule that shields information suppliers from claims that would expose them to indeterminate liability.³ Comparable carelessness resulting in comparably widespread physical harm would end in epic mass tort litigation.⁴ Had the false story been knowingly planted by an employee of a firm with suitably deep pockets there would be epic securities fraud litigation.⁵ Because the loss was solely pecuniary and resulted from mere carelessness no one had any hope for legal redress.

The United Airlines incident is a wonderful illustration of the usual reasons for why we have hard and fast rules limiting negligence liability for pure economic loss. The reasons are largely instrumental and economic. They are: 1) the disjunction between the private and social cost of an

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* (Bussani and Palmer eds. 2003), 94-119. *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, 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." See Restatement Second, Torts, 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. International Harvester Co.*, 581 P.2d 784 (Idaho 1978), pull together the strands of Restatement Second, Torts § 766C, Prosser's work on products liability, *Stevenson v. East Ohio Gas Co.*, and James' 1972 article on the topic. 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 (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. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982); *Noble v. Fauntleroy*, 709 A.2d 1264 (Md. 1998); *Clark v. Rowe*, 701 N.E.2d 624 (Mass. 1998); *Sommer v. Federal 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 Hydroelectric Co. v. Copp*, 779 A.2d 67 (Vt. 2001).

³ See Restatement Second, Torts § 552(2), which limits liability to a "limited group of persons" whom the actor intends to use the information and to intended uses. Carl Pacini and David Sinason, *Gaining a New Balance in Accountants' Liability to Nonclients for Negligence: Recent Developments and Emerging Trends*, 103 *Com.L.J.* 15 (1998), reports that 18 of 36 states purport to follow the Restatement by judicial decision or statute, though two (Minnesota and Texas) have an avowedly liberal interpretation. By their count 13 states require privity or near privity. New York is the leading example. It requires a direct contact between an information supplier and a plaintiff. *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.

⁴ For the story of the immediate legal aftermath of the wreck of the Exxon Valdez see Deborah 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, 278 (2000). She reports hundreds of lawyers descended on the state and filed thousands of claims.

⁵ It would be a lock-cinch fraud on the market claim by persons who sold the stock that morning. The theory of fraud market is available for stock that is traded on an "efficient market" so long as there is a sufficiently 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,

accident when a loss to one person is largely offset by another's gain⁶; 2) the administrative cost and risk of error in determining causation and contributory fault in a case involving far flung losses⁷; 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 To impose negligence liability on the firms responsible for the losses in the United Airlines incident is an expensive exercise that is counter-indicated if your goal is minimizing the social cost of accidents. The exercise is of dubious value at best if your 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.

I argue these reasons 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 there might well be liability under the modern negligence principle. These other reasons can be summarized in the form of a taxonomic claim. I argue the law of negligent misrepresentation is best understood as a problem akin to contract and not as part of negligence law. Google, Income Securities Advisors, and Bloomberg have no possible liability to sellers who acted on the false report of United's bankruptcy filing because there is no plausible claim they reasonably appeared to intend to invite traders to attach substantial importance to the information they transmitted in trading United's stock. The indeterminacy of the potential liability buttresses the conclusion no one undertook a duty of care in supplying information, but in my view the indeterminacy of the liability is neither necessary nor perhaps sufficient to this conclusion.

The taxonomic claim goes to the heart of a disagreement between me

⁶ William Bishop, *Economic Loss in Tort*, 2 *Oxford J. Leg. Stud.* 1 (1981); William Bishop and John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 *J. of 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, 733-745 (2004).

⁷ Victor Goldberg, *Recovery for Economic Loss Following the Exxon Valdez Oil Spill*, 23 *J. Legal Stud.* 1 (1994), justifies the exclusion of liability for indeterminate losses by the difficulty of determining the claimant's contributory fault (both pre and post accident), causation, and damages. 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 off-setting gains realized by firms that can better utilize existing assets. See also Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 *Rutgers L. Rev.* 711 (2004)(concluding the general exclusion of recovery for relational losses and the exceptions can be explained by an amalgam of economic arguments).

⁸ See Fleming James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 *Vand. L. Rev.* 43, 45 (1972) ("The explanation . . . is a pragmatic one: the physical consequences of negligence have been limited, but the indirect economic repercussions have been 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. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 *Stan. L. Rev.* 1513 (1985), is of the same view.

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 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 disagreement on a tectonic issue would recur 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 details.

Getting closer to the heart of the matter, I argue liability for carelessly misleading another under the heading of negligent misrepresentation is best understood as strongly relational and as weakly prioritizing private-ordering. In both respects this jibes with modern American contract law, specifically those parts of contract law that protect reliance on informal commercial understandings, such as the doctrine of promissory estoppel. The obligation is strongly relational for it grounds on a special type of interaction between two people, which is similar to an informal promise or agreement, in which one person reasonably appears to invite another to rely on information supplied to guide the other's actions. Private-ordering is weakly prioritized for the law provides a legal space for people to regulate their own affairs. It does this 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.

My argument is interpretive and analytical. An interpretive analytical account of an area of the law attempts to define an area's essential characteristics largely taking the law on its own terms.⁹ I take a broad and historical perspective, examining theoretical accounts of the relevant bodies of law—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 19th century. History illuminates the basic trade-offs required in constructing a theory of obligation that is more or less based on a principle of facilitating private ordering. While 19th 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 the best account of the core of each area cannot be applied overly rigorously at the periphery either to limit the scope of the

⁹ Stephen A. Smith, *Contract Theory* 43 (Oxford 2004). I expand on the goals of such a theory in Part IV-A when I respond to Smith's argument that the best theory of contract excludes liability from negligent misstatement from contract.

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).

The nature of my argument invites the objection 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. This will bring me back to the United Airlines incident in the end. The incident brings to mind a world in which fortunes can be lost as a result of decisions made mechanically based on information produced mechanically with no conscious human involvement at the point of interaction. The law of negligent misrepresentation is poorly suited to dealing with mechanical human interaction just as classical contract law is poorly suited to dealing with form contracts and bureaucratized exchange. My response to this objection in brief 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.

II. 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 the concept of invited reliance has a great deal of explanatory power in this area of law.¹⁰ Reliance is invited if an actor supplies information *with an apparent purpose* that the recipient be able to rely on the information. To put it colloquially, we can imagine an actor saying when he supplies information to another “I want you to be able to rely on this.” I believe 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. My goal in this Part is not to persuade you of this claim’s validity. Persuasion lies in details, which can quickly become tiresome. My hope is to give you a sense of the claim and to persuade you that it might well be right

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*. There are differences between inviting

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).

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 *x* about 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*. Expressions of warranty and contract commonly suggest that a communication is understood to have legal consequence. These differences are not small. As you shall see, 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 the obligation belongs outside of contract law.

These differences pale in comparison to the differences between invited reliance and the modern negligence principle. The modern negligence principle is a rule of prima facie liability for harm carelessly caused.¹¹ Under the principle *A* owes a duty of reasonable care to *B* in stating *x* if the statement creates a foreseeable risk of harm to *B*. If *A* fails to use reasonable care and misstates *x*, then *A* is subject to liability to *B* for any harm resulting from the misstatement if the harm is among the risks that make *A*'s misstatement of *x* unreasonable. For example, if the modern negligence principle applies, 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 predictably harms an employee. While there may be a negligence claim here there is no possible negligent misrepresentation claim. 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 explains why a lender owes no duty of care to a borrower if the lender inspects property to protect its own security even if the lender knows the buyer will receive and rely on the report.¹² It explains why an actor who prepares a report to guide one party in a

¹¹ See Part IV-B.

¹² *Meyers v. Guarantee Sav. & Loan Assn.*, 144 Cal. Rptr. 616 (Cal. App. 1978); *Butts v. Atlanta Federal Sav. & Loan Assn.*, 262 S.E.2d 230 (Ga. App. 1979); *Daniels v. Army Nat. Bank*, 822 P.2d 39 (Kan. 1991); *Rzepiennik v. U.S. Home Corp.*, 534 A.2d 89 (N.J. Super. 1987); *Henry v. First Federal Sav. & Loan Assn.*, 459 A.2d 772 (Pa. Super. 1983); *Peterson v. Mutual 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. *Hulse v. American Title Co.*, 33 P.3d 122 (Wyo. 2001); *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423 (Idaho 1988); *Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.*, 562 A.2d 208 (N.J. 1989) *Stewart Title Guaranty Co. v. Cheatham*, 764 S.W.2d 315 (Tex. App. 1988); *Greenberg v. Stewart Title Guaranty Co.*, 492 N.W.2d 147 (Wis. 1992). For the contrary view see *Title Ins. Co. of Minnesota v. Costain Arizona, Inc.*, 791 P.2d 1086 (Ariz. App.1990); *Shada v. Title & Trust Co. of Florida*, 457 So.2d 553 (Fla.App. 1984); *Ford v. Guarantee Abstract & Title Co., Inc.*, 553 P.2d 254 (Kan. 1976); *Heyd v. Chicago Title Ins. Co.*, 354 N.W.2d 154 (Neb. 1984).

transaction owes no duty of care to another party to the same transaction even if the other party predictably relies on the report.¹³ 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.¹⁴ The legend led the buyer reasonably to believe the stranger who produced the survey wanted him to be able to rely on it.

The concept of invited reliance captures the essence of the relationship between plaintiff and defendant in cases in which there is unquestionably a duty of care in supplying information. These are cases in which an agent supplies information to a principal or a professional supplies information to a client.¹⁵ The essence of supplying information as an agent or as a professional to a client is that information is supplied for the very purpose of serving the recipient. Indeed, the presumption is that 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.¹⁶ Another formula requires that a plaintiff and defendant be in a “special relationship of trust and confidence.”¹⁷

¹³ *Goodman v. Kennedy*, 556 P.2d 737 (Cal. 1976), holds an attorney who supplies opinion to client regarding a transaction has no duty to other parties to the transaction though they predictably rely on the opinion. *Hughes v. Holt*, 435 A.2d 687 (Vt. 1981), holds an inspector who supplies report to owner of property to enable owner to refinance owes no duty of care to subsequent purchaser to whom buyer passes on report. *Hoffman v. Greenberg*, 767 P.2d 725 (Ariz. App. 1988), and *Fisher v. Comer Plantation, Inc.* 772 So.2d 455 (Ala. 2000), are similar.

¹⁴ *Rozny v. Mamul*, 250 N.E.2d 656 (Ill. 1969). To similar effect are: *Hanneman v. Downer*, 871 P.2d 279 (Nev. 1994); *Kent v. Bartlett*, 49 Cal. App. 3d 724 (1975); *Hostetler v. W. Gray & Co., Inc.*, 523 So. 2d 1359 (La. App. 1988); *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231 (Tex. Civ. App. 1985); *Ivalis v. Curtis*, 496 N.W.2d 690 (Wis. 1993).

¹⁵ *James & 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.”

¹⁶ This is the rule in Illinois. See, e.g., *DuQuoin State Bank v. Norris City State Bank*, 595 N.E.2d 678, (Ill. App. 1992). *First Midwest Bank, N.A. v. Stewart Title Co.*, 823 N.E.2d 168, (Ill.App. 2005), looks 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 for risks greater than those it agreed to bear in the transaction. The Illinois rule has led to short shrift being given to some claims that would be viable elsewhere. For example, *University of Chicago Hospitals v. United Parcel Service*, 596 N.E.2d 688 (Ill. App. 1992), holds 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.” *Decatur Memorial Hosp. v. Connecticut General Life Ins. Co.*, 990 F.2d 925 (7th Cir. 1993)(Illinois law), questions the premise.

¹⁷ The standard comes from *International 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. *Kimmell v. Schaefer*, 675 N.E.2d 450 (N.Y. 1996); *AFA Protective Systems v. American Tel. & Tel. Co.*,

The concept of invited reliance explains the content of an actor's duty of care when there is a duty. If an actor undertakes to advise another on a specific aspect of a transaction, then the actor owes a duty of care to the other only with respect to that aspect. For example, an agent hired to obtain homeowner's insurance has no duty to warn the owner of the desirability of flood insurance.¹⁸ And a broker hired to sell land and buy other land has no duty to advise their client of the possibility of structuring the transaction as a tax-free exchange.¹⁹ There is no duty beyond the scope of the actor's undertaking in these cases 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.

The concept of invited reliance explains the scope of liability for breach of a duty of care. 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 of no foundation problems, and the home turns out to be total loss because of soil contamination, the engineer is not liable for the loss because he did undertake to advise the buyer about contaminants.²⁰

The law of negligent misrepresentation fits well in contract for other reasons. Contract ways of thinking generally determine the effect of an expression by an actor regarding the character of an actor's obligation in supplying information, particularly if the expression is written. An information supplier can avoid liability to a recipient by attaching to the

442 N.E.2d 1268 (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.

¹⁸ *Nowell v. Dawn-Leavitt Agency, Inc.*, 617 P.2d 1164 (Ariz. App. 1980), which disposes of the claim on summary judgment noting the policy considerations. *Nowell* is no longer good law in Arizona. *Southwest Auto Painting and Body Repair, Inc. v. Binsfeld*, 904 P.2d 1268 (Ariz. App. 1995), reads a later 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 characterizes the issue in *Nowell* as one of breach rather than duty. *Murphy v. Klein*, 682 N.E.2d 972 (N.Y. 1997), 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 themselves out as having expertise in the specific field. *Fitzpatrick v. Hayes*, 67 Cal. Rptr. 2d 445 (App. 1997). For other cases see the Annotation 88 A.L.R.4th 289.

¹⁹ *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.

²⁰ The sharpest examples involve securities fraud. *Greenberg v. De Tessieres*, 902 F.2d 1002 (D.C. Cir. 1990) (D failed to disclose shady background of managers of investment in charter cruise ship, venture failed when charter party backed out); *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F.Supp. 248 (S.D.N.Y. 1997) (D misrepresented risk on repo agreement, investment in tax shelter went bust because of adverse IRS action and over-expansion for firm); *Collins v. Adams Dairy Co.*, 661 S.W.2d 603 (Mo. 1984) (D misrepresented that competing store planned to close, remanding to allow D to show that P's store would have been losing venture in any event).

information a warning to the recipient not to rely or by attaching an exculpatory term.²¹ There is no comparable power to define the duties one owes in the law of negligence by unilateral expression. A driver on a public road cannot limit his duty of care to other drivers by placing a sign on his car declaring he should not be relied upon to drive carefully. The effect of a disclaimer or exculpatory term is determined much as it is in contract law, by asking whether a plaintiff reasonably should have understood 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. An example is 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.²² There is a small exception to this rule to cover unusual cases in which a defendant undertakes to protect a plaintiff from the specific conduct in question.²³ In the law of negligent misrepresentation (and the law of economic negligence more generally) this result is the rule and not the exception because the existence of duty and liability generally depend on the sort of undertaking to protect a plaintiff from an employee's conduct that will preclude apportioning responsibility to the employee.²⁴ Note in

²¹ See, e.g., *Hill v. Bache Halsey Stuart Shields*, 790 F.2d 817 (10th Cir. 1986). There are stylized terms to describe the extent of an auditor's. *First National Bank of Bluefield v. Crawford*, 386 S.E.2d 310 (W.Va. 1989). For further authority and explanation see Mark P. Gergen, *Contracting Out of Liability for Deceit, Inadvertent Misrepresentation, and Negligent Misstatement*, in *Exploring Contract Law* (2009), 237, 260-265.

²² Restatement Third, Torts: Apportionment of Liability § 5 imputes 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." Imputed responsibility is then taken into account under § 7.

²³ The paradigmatic case covered by the exception is when a plaintiff negligently injures himself and the injury is exacerbated by the doctor. The doctor may not diminish his liability on the ground that the plaintiff bore some responsibility. See Restatement Third, Torts: Apportionment of Liability § 7 Comment *m*.

²⁴ The principle is at the heart of the audit interference doctrine, which provides 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 makes possible defalcations an auditor negligently fails to prevent. *Steiner Corp. v. Johnson & Higgins of California*, 135 F.3d 684 (10th Cir.1998)(Utah law); *Board of Trustees of Community College Dist. No. 508, County of Cook v. Coopers & Lybrand*, 803 N.E.2d 460 (Ill. 2003); *Lincoln Grain v. Coopers & Lybrand*, 345 N.W. 2d 300 (Neb. 1984); *Collins v. Esserman & Pelter*, 681 N.Y.S.2d 399 (1998); *Stroud v. Arthur Andersen & Co.*, 37 P.3d 783 (Ok. 2001). *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905 (Minn. 1990), abolishes the doctrine while preserving the underlying principle. The doctrine usually is associated with *National Surety Corp. v. Lybrand*, 9 N.Y.S.2d 554 (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 principle stated in text. 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. 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

this situation contract ways of thinking expand liability.

Treating negligent misrepresentation as a problem of contract law helps to untangle some knotty doctrinal legal problems. Courts have struggled to formulate a basis for barring a tort claim for a misstatement by a defendant 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.²⁵ Other rules are better tailored but remain over and under-inclusive.²⁶ 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 statutes of fraud, would preclude a claim on a representation.²⁷ While there

verifying sums actually on deposit if it relied on the auditor's undertaking to do so.

²⁵ 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. *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604 (3d Cir. 1995)(Pennsylvania law); *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477 (9th Cir. 1995)(Arizona law); *Pulte Home Corp. v. Osomose Wood Preserving, Inc.*, 60 F.3d 734 (11th Cir. 1995)(Florida law)(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)(Michigan law); *Danforth v. Acorn Structures, Inc.*, 608 A.2d 1194 (Del. 1992); *Sebago, Inc. v. Beazer East, Inc.*, 18 F.Supp.2d 70 (D. Mass. 1998)(limiting the rule to sales of goods).

Less crude but still too clumsy are the rules 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, *National Can Corp. v. Whittaker Corp.*, 505 F.Supp. 147 (N.D. Ill. 1981)(Illinois law), or that a duty of care is owed only when an actor is in the business of supplying the information, *Alderson v. Rockwell Intern. Corp.*, 561 N.W.2d 34 (Iowa 1997).

²⁶ One such rule precludes negligence liability that is inconsistent with a valid disclaimer, merger provision, or other express term. *Sound Techniques, Inc. v. Hoffman*, 737 N.E.2d 920 (Mass. App. 2000); *Rio Grande Jewelers v. Data General Corp.*, 689 P.2d 1269 (N.M. 1984); *Stanley v. Miro*, 540 A.2d 1123 (Me. 1988); *Snyder v. Lovercheck*, 992 P.2d 1079 (Wyo. 1999); *Brogan v. Mitchell Intern., Inc.*, 692 N.E.2d 276 (Ill. 1998); *Hodgkins v. New England Telephone Co.*, 82 F.3d 1226 (1st Cir. 1996)(Maine law); *Vermont Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272 (2d Cir. 1996)(Vermont law); *Lowe v. AmeriGas, Inc.*, 52 F.Supp.2d 349 (D.Conn. 1999), affirmed 208 F.3d 203 (2d Cir 2000)(Connecticut law). While good as far as it goes the rule 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 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. *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374 (Alaska 1984)(rejecting claim by temporary pilot for misstatement that position was permanent); *Jordan-Milton Machinery v. F/V Teresa Marie, II*, 978 F.2d 32 (1st Cir. 1992)(statement that manufacturer would provide financing); *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149 (Kan. 2000)(statement that firm "treated its people well"); *Rodowicz v. Massachusetts Mut. Life Ins. Co.*, 279 F.3d 36 (1st Cir. 2002)(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)(Wisconsin law)(statements to inventor of plans to market invention); *McMillion v. Dryvit Systems, Inc.*, 552 S.E.2d 364 (Va. 2001)(manufacturer's statements regarding qualities of product); *Zhu v. Countrywide Realty Co., Inc.*, 165 F.Supp.2d 1181 (D.Kan. 2001)(Kansas law); *Valley Regional Medical Center v. Wright*, 276 F.Supp.2d 638 (S.D. Tex. 2001)(Texas law). The rule cannot be extended outside the contractual setting for in other settings a misstatement of opinion or prediction is actionable. And it is too narrow in the contractual setting for it permits a negligence misrepresentation claim based on an oral warranty.

²⁷ 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 (N.Y.A.D. 2004)(assurances by provider of software regarding its capacity); *CooperVision, Inc. v. Intek Integration Technologies, Inc.*, 94 N.Y.S.2d 812 (N.Y.Sup. 2005)(software license and service agreement); *Fleet Bank v. Pine Knoll Corp.*, 736 N.Y.S.2d 737 (N.Y.A.D. 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 (N.Y.A.D. 2000)(broker did not disclose construction on property adjacent to one-

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.²⁸ 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.

III. THE HISTORY OF NEGLIGENT MISREPRESENTATION

A. *Glanzer v. Shepard: a contract in all but name*

The law of negligent misrepresentation begins in the United States in 1922 in a case involving a mistake in weighing beans.²⁹ As a result of the mistake Glanzer Bros. overpaid \$1,261.26 for beans it purchased from Bech. Apparently Glanzer Bros.' contract with Bech did not allow it to recover the overpayment from Bech.³⁰ This would explain why Glanzer Bros. sued Shepard, the bean weigher hired by Bech and the party responsible for the mistake. The trial court directed a verdict for Glanzer Bros. on the theory it was a third party beneficiary of Bech's contract with Shepard. The decision was reversed by the Appellate Term and then reinstated by the Appellate Division on the third party beneficiary theory. With a short opinion by Justice Cardozo, The New York Court of Appeals, the preeminent common law court of the day and one of the great common law courts of all time, affirmed the Appellate Division, but on a different ground.³¹

Legal theorists of the day appreciated this was no ordinary opinion even for Cardozo. In an article published in 1939, on the occasion of Cardozo's death, Warren Seavey observes that in *Glanzer v. Shepard* Cardozo uses "every dialectic weapon which could be brought to bear"³² to move the law forward. As Seavey tells it, Cardozo persuades by cataloging "diverse situations in which recovery had been allowed." The brilliance of this

month vacation sublease)

²⁸ See Mark P. Gergen, Contracting Out of Liability for Deceit, Inadvertent Misrepresentation and Negligent Misstatement, in *Exploring Contract Law* (2009), 237, 259-260.

²⁹ When Francis Bohlen presented a draft Section on negligent misrepresentation for the Restatement of Torts in 1935, he prefaces 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*."

³⁰ 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.

³¹ *Glanzer v. Shepard* 135 N.E.2d 275 (N.Y. 1922).

³² Warren Seavey, Mr. Justice Cardozo and the Law of Torts, 39 Colum. L. Rev. at 43.

strategy, according to Seavey, is that it “makes clear the fundamental principle and the futility of widely diverse rules for situations essentially similar.”³³

Cardozo never states the fundamental principle.³⁴ I believe this is not because he thought it 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.”³⁵ As you shall see, this is a cryptic reference to key features of contract in classical theories of contract. The rest of the opinion is a list of cases—the list includes 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. 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.”³⁶ Cardozo goes on to say he could “stress the element of contract” or he could treat Shepard as Glanzer’s agent. But he chose not to. “These other methods of approach arrive at the same goal, though the paths may at times seem artificial or circuitous. We have preferred to reach the goal more simply.”³⁷

Cardozo’s next foray into this area of law, *Ultramares Corp. v. Touche*,³⁸ confirms that he understood the duty he found in *Glanzer v. Shepard* to be essentially contractual. A lender who lost a substantial sum of money relying on inaccurate certified accounts sued the auditor claiming both negligence and deceit. The case was unlike *Glanzer*, Cardozo argues in rejecting the negligence claim, for “No 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.”³⁹

Why in *Glanzer v. Shepard* does Cardozo choose not to rest the decision

³³ Id. at 44.

³⁴ I believe Seavey is referring to a principle he states in Warren A. Seavey, *Principles of Torts*, 56 Harv. L. Rev. 72, 76 (1943). “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.

³⁵ 135 N.E. at 276.

³⁶ Id.

³⁷ Id.

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

³⁹ Id. at 446. This passage in *Ultramares* is little remembered. What is remembered is a later passage in which Cardozo argues against negligence liability on the ground it would be indeterminate.

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”? Subpart B answers this question. Subpart C explains why the tort was characterized as a matter of misrepresentation rather than simply negligence.

B. Classical theories of contract constrict the field

1. Llewellyn and Beale

In a 1931 essay, *What Price Contract?*,⁴⁰ Karl Llewellyn observes one price exacted by dominant theory of contract at the time is that categories of obligation once thought of as contractual that do not fit the theory “drop quietly out of contemplation, unnoticed, unmissed, unmourned—and *unaccounted for*” (emphasis in the original).⁴¹ Cardozo’s family of cases appear at the end of Llewellyn’s long list—“gratuitous undertakings cognizable in tort or recognized as agencies.”

Llewellyn’s clever title equates “contract” with an idea of contract we associate with classical theories of contract.⁴² In its most succinct form classical theory defines contract as “A promise the law will enforce.”⁴³ John Salmond identifies a key feature of classical theories in his treatise on jurisprudence: “[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.”⁴⁴ Lon Fuller describes this key feature more succinctly when he observes classical theorists conceived of contract as private legislation.⁴⁵ Arthur Leff adds context and a purpose: “the common law’s category of ‘contract’ was developed as a method for segregating, for a particular and predictable treatment, contemplated trading transactions between free-willed persons in an assumedly free enterprise, free-market economic system.”⁴⁶

Llewellyn’s reference to “gratuitous undertakings cognizable in tort or recognized as agencies” probably is an allusion to an 1891 article by Joseph Beale with the misleading title “Gratuitous Undertakings.”⁴⁷ Beale’s topic is a group of cases in which a plaintiff entrusts his person, property, or money to the hand of the defendant. A few of Beale’s cases involve a truly gratuitous undertaking by a defendant and pure economic loss.⁴⁸ But

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

⁴¹ *Id.* at 704-5.

⁴² I use the plural for, as you shall see, there is no canonical form of the theory.

⁴³ Restatement Second, Contracts Section 1.

⁴⁴ John William Salmond, *Jurisprudence or the Theory of the Law* (London 1902), at 380.

⁴⁵ Lon L. Fuller, *Consideration and Form*, 41 *Colum. L. Rev.* 799, 806 (1941). Fuller grounds contract law on “the principle of private autonomy” that postulates “private individuals as possessing a power to effect, within certain limits, changes in their legal relations.”

⁴⁶ Arthur Leff, *Contract as Thing*, 19 *Amer. U.L. Rev.* 131, 137 (1970).

⁴⁷ 5 *Harv. L. Rev.* 222 (1891).

⁴⁸ *Whitehead v. Greetham*, 2 *Bing.* 464, 130 *Eng. Rep.* 385 (1825), is an example. It is 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.

Beale's family of cases is broader than this. In many the defendant is a professional, a tradesman, an innkeeper, or a common carrier. In some the plaintiff is an intended beneficiary of the defendant's contract with a third person, such as the plaintiff's employer.⁴⁹

Beale argues it is useful to create a category of obligation between contract and tort to cover this odd family of cases. The following passage gives you a general sense of his argument:

"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 exist 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."⁵⁰

Beale's third category of obligation is similar to contract in that a duty is voluntarily undertaken. But for Beale and his contemporaries this feature is not enough to treat the cases as problems of contract. The sticking point for Beale is not the gratuitousness of the obligation or the absence of bargained for consideration. Beale notes often in these cases a defendant is paid by a plaintiff. In some there even is a writing spelling out some terms of the defendant's undertaking. An example is an undertaking by a common carrier to use care in handling goods. Beale focuses on gratuitous undertakings so he may put to the side "complications" regarding how far parties by agreement could "supersede the principles of the common law."⁵¹ As for what the precise sticking point is, the passage quoted above provides two clues. The penultimate sentence says that what is missing "a promise of B." The first sentence says that what is missing is a formal expression of consent to undertake a duty. For Beale the liability for carelessness in performing an undertaking cannot be described as contractual because there is no expression of intent to undertake a forward-looking duty.

Beale accepts unquestioningly the classical conception of contract. From one perspective this is unsurprising for he wrote in the early 1890s in the heyday of classical theories.⁵² From another perspective his uncritical

⁴⁹ 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. None 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.

⁵⁰ *Id.*

⁵¹ *Id.* at 222-223.

⁵² P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979). Atiyah labels 1770-1870 as "The Age of

acceptance of the theory is remarkable the theory is younger than Beale, who was borne in 1861. The idea of contract we associate with classical theories first appears in English language treatises in the late 1860s and mid-1870s. Llewellyn is right. The obligations in Beale's cases were treated as contractual until the rise of classical theories of contract pushed them out of the field.

2. Invited reliance as the Ur form of *assumpsit* in case

Contract is not written about as a generic category of obligation by common lawyers until the late 18th and early 19th century. As late as 1800, if a lawyer bungled your case,⁵³ a carrier damaged your goods, or a farrier bungled in shoeing your horse, and you sought legal redress in an English or American court, you would not bring an action for negligence, professional malpractice, or breach of contract. Instead you would bring an action either for *assumpsit* or for trespass on the case.⁵⁴

Beale looks to the "ancient" history of *assumpsit* to find a "technical name" for his third category of obligation, referring to the obligation as "an *assumpsit*" meaning "he undertook."⁵⁵ This use of the term *assumpsit* goes back at least to the 14th century and to the use of the action for trespass on the case to recover for mis-performance of informal contracts.⁵⁶ The nominally contractual actions of debt or covenant did not cover such claims, unless the claimant had the foresight to obtain a conditional bond securing the defendants' performance or the foresight to embody the service agreement in a document under seal. Nor did such claims easily fit trespass, which nominally required pleading a forcible wrongdoing.⁵⁷ These claims

Freedom on 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 expressed intention to undertake a legal obligation.

⁵³ *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng. Rep. 74 (1767), is said to be the first reported malpractice claim against an attorney. The report does not indicate the form of the pleading. The claim was for a debt when the debtor was released from custody after two terms because the attorney negligently failed to file a required declaration.

⁵⁴ The summary of the argument of plaintiff's counsel in *Thorne v. Deas*, 4 Johns 84 (N.Y. Super. 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."

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 the argument of defendant's counsel there is no legal obligation in a gratuitous promise.

⁵⁵ 5 Harv. L. Rev. at 223.

⁵⁶ D.J. Ibbotson, *A Historical Introduction to the Law of Obligations* 126 (Oxford 1999), makes the point in precisely these terms.

⁵⁷ 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 a 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 History of the Law of Torts* 47, 50-53, 59-60 (Duncker & Humboldt 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. Ibbotson speculates that

could be brought in trespass on the case because its causative events were unspecified. A claim had two basic parts. The second part was a description of the defendant's harmful conduct. This was preceded by a "whereas" clause that explained why the harmful conduct should be actionable. This form of pleading is useful for a lawyer who wants to press a novel claim or a claim for which there is no formulaic pleading for it enables a lawyer to tell 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.⁵⁸ In a word: *assumpsit*.

The stories told in the "whereas" clauses in the early pleadings of trespass on the case involve a plaintiff accepting a defendant's invitation to entrust the plaintiff's body, property, or money to the defendant's care 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 over-loaded, as alleging "the ferryman received the mare to carry it safely."⁵⁹ 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 William's horse." Later, when it became the practice to plead *assumpsit* without telling the back story, 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."⁶⁰ One way to describe the gist of the conduct creating a duty is the idea of an entrustment. Broadening the idea beyond cases in which a plaintiff physically entrusts his body, his property, or his money to a defendant's hand to include cases in which a

while trespass could be and was stretched quite far, we can fairly surmise that trespass on the case was the preferred writ for claims of a type for which we have records of the writ being used because the writ had two advantages. One is that the writ could cover cases, such as a seller tampering with goods, in which it was implausible to claim the defendant used force against the claimant's person or property. The other is that the formal pleading of trespass risked confusing the jury, which was summoned by the sheriff and told the nature of a claim so the jurors could make inquiries before the hearing. *Id.* at 48-51.

⁵⁸ 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 or 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 History of the Law of Torts 173, 186-187* (Duncker & Humboldt 2001).

For the history of the separation of trespass and trespass on the case see D.J. Ibbotson, *A Historical Introduction to the Law of Obligations 43-57* (Oxford 1999). Ibbotson observes that in the middle part of the 14th century claimants had mixed success with fact-specific pleadings of trespass in cases in which the facts pleaded made it clear that the wrong complained of did not involve force or breach of the King's peace but these formulaic elements were included. The division between trespass and trespass on the case occurred in the latter part of the 14th century when fact-specific pleadings omitted the formulaic elements and courts began to treat such pleadings as a distinct form of action.

⁵⁹ A.W.B. Simpson, *A History of the Common Law of Contract 210-220* (1975).

⁶⁰ *Id.* at 217.

plaintiff allows a defendant guide his conduct, we might describe the gist of the idea as invited reliance.

Over the next several centuries this sense of *assumpsit* became secondary as the action of *assumpsit* was 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 law of restitution and the modern law of unjust enrichment.⁶¹ At some point English lawyers began to organize these materials into a body they thought of as contract law in a way that was distinct from the forms of action. No doubt this occurred gradually.⁶² Early common law accounts of contract as a category of obligation treat it as an open-ended category that includes Beale's cases and more. Blackstone's *Commentaries* includes the cases in a category of implied contracts, which he juxtaposes with express contracts, and which he places alongside implied contracts to pay for services, goods, or money received and to hold money received on behalf of another. All of this is in materials on Property, suggesting Blackstone thought the most important use of contract is to transfer property. Blackstone describes 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."⁶³

The early American and English contracts treatises largely follow Blackstone in how they define and organize the field.⁶⁴ It is difficult to find

⁶¹ *Assumpsit* was used to recover damages for breach of formal agreements, to recover unpaid debts, to recover payment for services rendered or goods supplied under an informal agreement, to recover money mistakenly paid, and more. Many of these uses became formulaic pleadings in their own right that were called, appropriately, 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).

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, *Negligence in Eighteenth Century Common Law*, in *Negligence: The Comparative History of the Law of Torts* 173, 217 (Duncker & Humboldt 2001).

⁶² D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), at 215, concludes that "by 1800 the law of contract could be treated as an abstract entity distinct from the forms of action." He argues that by the 18th 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 to me. Ibbetson cites the *Treatise on Equity* (1737) attributed to Henry Ballow as incorporating a theory of contract that grounded contract on promise as an expression of will. Ibbetson at 217-219. The treatise does discuss what is an effective act of will or reason at great length but this is not a theory of contract as promise. Ballow's conception of "contract" is sufficiently unformulated for him to define involuntary obligations as a species of contract. Vol I p. 4. 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 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."

⁶³ William Blackstone, *Commentaries on the Laws of England* (1765-1769), Bk 3, chap. 9, pp. 163-164. 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. 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.* at 164.

⁶⁴ Comyn's description of the category of implied contract in his overview of the field is lifted directly from Blackstone giving due credit. Samule Comyn, *A treatise of the law relative to contracts and agreements not under seal : with cases and decisions thereon in the action of assumpsit.* (London 1807), Vol I p. 6. Comyn adds a

in them anything that resembles a general theory of contract.⁶⁵ Parsons' treatise (1857) is atypical in that he has a brief sketch of a recognizable theory.⁶⁶ After noting some "contracts are deliberately expressed with all the precision of law," Parsons adds "more frequently" contracts are "simpler and more general" and "leave more to the justice, the intelligence, and the honesty of the parties," and "far 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."⁶⁷ This is similar to the modern concept of relational contracts. Parsons first principle of contract construction and interpretation is "to find in a contract a meaning which is honest, sensible, and just without doing violence to the expressions of the parties."⁶⁸ This is similar to the modern doctrine of reasonable expectations. Parsons questions the significance of the element of consideration⁶⁹ and defines consideration expansively as any basis for enforcing a promise.⁷⁰ This includes consideration for an implied promise to use "due care and diligence" in a

lengthy discussion of the hoary question whether an action will lie for nonfeasance in a gratuitous undertaking. Vol. II pp. 367 et seq. C.G. Addison. *Treatise on the law of contracts and rights and liabilities ex contractu* (London 1847) 210-212, illustrates the category with numerous specific instances, some involving gratuitous undertakings (e.g., bailment), others 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). Metcalf, *Principles of the Law of Contracts* (1867) 4, places alongside express contracts "an implied contract . . . inferred from the conduct, situation, and mutual relations of the parties, and enforced by law on the ground of justice; to compel the performance of a legal or moral duty." He follows this with a list similar to Blackstone. Invariably bailment is among the contracts covered and with it recognition of the attendant possibility of liability for negligence in performing an informal or gratuitous undertaking. See Joseph Chitty. *A practical treatise on the law of contracts not under seal, and upon the usual defences to action thereon* (London 1826), 142-155; William Story, *A treatise on the law of contracts not under seal*. (Boston 1844), 252-300.

⁶⁵ For example, Hilliard (1872) defines contract simply as agreement without explaining the constitutive elements of agreement Francis Hilliard, *The law of contracts* (Philadelphia 1872), Vol I at 2-3. 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 rises to an action in contract or tort. *Id.* Vol II at 288-289.

Joseph Story, *Commentaries on the Law of Bailments* (Cambridge, Mass. 1832), 5-6, 101, characterizes the liability for misfeasance by a gratuitous bailee as contractual. 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* (2nd ed. Cambridge, Mass. 1840), 5 n. 2. 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.

⁶⁶ 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* (London 1818), at 2. 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. Theron Metcalf, *Principles of the law of contracts as applied by courts of law*. (New York 1867), at 4-5, defines contract as agreement including obligations "inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice." He gives as an instance the implied obligation to perform a task with reasonable care.

⁶⁷ Theophilus Parsons, *Law of Contracts* (3d ed. 1857), p. 4.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 357 et seq.

gratuitous undertaking with the consideration being the claimant's "trust and confidence."⁷¹ Parsons illustrative cases are liability for negligence by a gratuitous bailee and a gratuitous agent.⁷²

3. Pollock and the rapid success of classical theories

Leake's contract treatise (1867) is the first clear expression by an English lawyer of a theory of contract that fits the description of a classical theory.⁷³ The treatise has been disparagingly compared with Pollock's later treatise (1876) as being written for bench and bar and not for Pollock's audience of "students of principles and legal thinkers."⁷⁴ I think this is unfair to Leake. While his theory of contract may seem bizarre to American lawyers,⁷⁵ the problem with it is that it is too rigorous, not that it is under-theorized. Leake takes his framework from civil law and Austin's jurisprudence. He distinguishes rights in personam and rights in rem, describing the former as part of the law of obligations. He then divides obligations into two categories: *ex contractu* and *ex delictu*.⁷⁶ The latter arise from infringement of a pre-existing right. The former do not. Rights *ex contractu* derive their force from being consensual and certain.⁷⁷ Leake follows this reasoning to the logical conclusion that breach of contract gives rise to a claim *ex delictu* because the right to damages is a secondary right. This move is spot on if you limit contract to consensual and certain obligations.⁷⁸ The contrast with Parsons' conception of contract as the law of obligations attendant to voluntary undertakings either by expression or by convention could not be sharper. It could be said that Leake fetishizes the idea of contract as private legislation. There is no room in Leake's theory of contract for Beale's cases. Indeed, there is no room in Leake's theory of contract for much of what we think of as contract law, including the rules on damages and the rules on contract construction.

Pollock's influential contracts treatise (1876) conceives of the core or

⁷¹ *Id.* at 372-373.

⁷² *Id.* at 372 note d.

⁷³ Stephen Martin Leake, *The elements of the law of contracts* (London 1867). A century earlier, a French lawyer, Robert Joseph Pothier, published a treatise that defined contract in terms that anticipate 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. The American edition is *A Treatise on Obligations*, considered in moral and legal view from the French of Pothier (Newbern, N.C. 1802). Pothier defines contract as "the promises which we make, with the intention of engaging and binding ourselves and of conferring on the other party the right of requiring the performance of them." *Id.* at 4.

⁷⁴ Duxbury at 189-90, quoting Lord Wright's memorandum for Pollock.

⁷⁵ 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 Stephen A. Smith, *Contract Theory* 104 (2004); Robert Stevens, *Torts and Rights* 286 (2007).

⁷⁶ *Id.* at 2-3.

⁷⁷ *Id.* at 4.

⁷⁸ This anticipates Fuller's objection that the will theory cannot justify a general rule of expectation damages for breach of a contract because "if a contract is a private law, it is usually a law which says nothing at all about what shall be done when it is violated." Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 58 (1936).

ideal case of contract much like Leake while producing an account of the field that is more familiar to us. Pollock begins the first edition of his treatise with a puzzle “that no such thing as a satisfactory definition of Contract is to be found in any of our books.”⁷⁹ He then seeks to supply a definition, eventually reaching what soon becomes the conventional definition of a contract as a promise the law will enforce.⁸⁰ Pollock’s method is essentially an exercise in stipulative definition. He begins by arguing that contract is a narrower category than both consensual transactions and agreements.⁸¹ His main example of a species of agreement that is not a contract is a gift.⁸² In puzzling through the difference between contract and gift, Pollock uses the case of two people bargaining and observes that in common understanding a contract is formed when a proposal or offer is accepted. But the feature of offer and acceptance does not distinguish contract from gift, as Pollock goes on to say, for a conveyance of property by gift involves the same sort of communication. A gift is not effective unless it is accepted by the donee. Then Pollock finds his answer: “The distinction is this: 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.”⁸³ Pollock drives the conclusion home: “A contract accordingly is an agreement which produces an obligation. In this case therefore, the 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.”⁸⁴ Like Leake for Pollock the essential feature of contract is that it is private legislation.

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.⁸⁵ Williston reads Pollock as going even further than this and requiring a shared intention to affect legal relations.⁸⁶ I think both may misread Pollock, but this is peripheral to my

⁷⁹ Frederick Pollock, *Principles of contract at law and in equity : being a treatise on the general principles concerning the validity of agreements* (London 1876), at 1.

⁸⁰ *Id.* at 5.

⁸¹ He defines agreement as “When two or more persons concur in expressing a common intention so that rights and duties of those persons thereby are determined.” *Id.* at 2.

⁸² *Id.* at 3.

⁸³ *Id.* at 5.

⁸⁴ *Id.* In later editions Pollock came round 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.R.* 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’ “ingenuous attempt to make the quid pro quo of debt cover everything.” *Id.* at 419 n. 1.

⁸⁵ Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004), at 192-193, 197.

⁸⁶ D.J. Ibbotson, *An Historical Introduction to the Law of Obligations* (1999), at 233. Williston read later editions of Pollock (he was editor of the American edition) as taking the position that an intent to form a legal relation was necessary for there to be a contract. Samuel Williston, *The Law of Contracts* (1920), Vol. 1, at 21.

story.⁸⁷ It is clear he thought of contract as private legislation fairly strictly defined. Pollock's treatise is a testament to the truth of Llewellyn's observation that this idea of contract causes obligations once thought of as contractual to drop "quietly out of contemplation, unnoticed, unmissed, unmourned—and *unaccounted for*." Pollock never addresses the relation of Beale's cases to contract in the first edition of his contract treatise.⁸⁸

We should not infer that Pollock thought the outcome of specific cases turned on one's theory of contract or on the classification of a case.⁸⁹ He was not that kind of formalist. Probably he thought liability in a case in which obligation is not sufficiently willed requires some additional and special justification that is unnecessary in the case of consensual and certain obligation.⁹⁰ But sometimes even this much is not clear. Pollock's views on

⁸⁷ 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 served by the doctrine of consideration. See Pollock, *Principles of Contract at Law and in Equity* (1876), at 163. Pollock observes "the main end and use of the doctrine of Consideration in our modern law . . . is to furnish with a reasonable and comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject matter." 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. Samuel Williston, *The Law of Contracts* (1920), Vol 1, at 20-21.

⁸⁸ He 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 in trust cannot be conveniently reduced to the ordinary elements of contract." *Id.* at 189.

⁸⁹ This sort of inference is commonplace. For example, Grant Gilmore infers that people who bought into classical theories of contract had a view of society with a "narrow scope of social duty" in which "the race is to the swift" and "no man is his brother's keeper." Grant Gilmore, *The Death of Contract* at 21. That hardly follows if they would recognize a non-contractual duty. Classical theories have been tied to individualism, subjectivism, and relativism. It is quite plausible that the prevalence of such moral views strengthened the appeal of classical theories of contract. P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979), which remains among the most thoughtful treatments of the legal materials within their intellectual milieu, connects the rise of classical theories of contract and the eclipse of the view of contract as relational and reliance based with liberalism, individualism, and the "gospel of freedom" (of a negative sort). James Gordley, *The Philosophical Origins of Modern Contract* (1991), tells a more nuanced story taking a longer and broader view. Gordley focuses on the will theory and broadens the story to include developments on the continent. He traces the roots of the will theory to the natural law tradition, arguing that 18th and 19th century theorists took the system of contract theory from Aristotelian and Thomistic philosophy while dropping the animating principles because the principles were alien to them.

A related criticism of Pollock and his contemporaries is that they put too much store in legal concepts. Roscoe Pound remarks, referring to Pollock and many of his contemporaries, "It was the belief of the Anglo-American historical jurist that like universally valid conceptions were derivable from the Year Books, by which questions arising in the law today might be answered." Roscoe Pound, *Interpretations of Legal History* 120 (1923). He is critiquing a "jurisprudence of conceptions." *Id.* at 123. David Rabban proves in his forth-coming book *Law's History* that this is a considerable over-statement. Pollock and his contemporaries understood the concepts were constructed by men like themselves to address problems of their day. My own reading of the materials is consistent with Rabban.

⁹⁰ Holmes makes essentially this point when he contrasts liabilities in contract, which "are more or less expressly fixed by the agreement of the parties concerned," with liabilities in tort, which "must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether they agree to it or not." Oliver W. Holmes, Jr., *The Common Law* 71 (1871).

Winterbottom v. Wainwright are an example.⁹¹ He argues the cases stands only for the “perfectly correct” position that a stranger could not sue upon a contract but that “[i]f bad faith or misfeasance by want of ordinary care had been shown . . . the result would have been different.” In other words, Pollock does not think the absence of privity bars a tort claim. In this prediction Pollock turned out to be wrong for a while.⁹²

Pollock discusses Beale’s cases in the first edition of his torts treatise (1889) but only in passing in the context of an uninteresting question.⁹³ 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 anticipating 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.”⁹⁴ It is clear Pollock does not think this is an operative legal rule or principle. Given the 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.”⁹⁵ Today this could well be claim for negligent misrepresentation. Pollock does not question the justness 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.”⁹⁶ It seems Pollock did not think of the possibility of defining an undertaking in terms of invited reliance, which would bring the concept closer to contract.

Pollock’s impact is enormous or he caught the spirit of the times. Contracts treatises after Pollock’s define the field largely in his terms.⁹⁷ Anson (1879) defines contract as an agreement between two or more

⁹¹ Pollock, Frederick, Sir. *The law of torts: a treatise on the principles of obligations arising from civil wrongs in the common law.* (London 1887), 449.

⁹² A half century later Percy Winfield explains this unfortunate patch of English law as a product of judicial intoxication with classical theories of contract. See Percy Winfield, *The Restatement of Torts: Negligence*, 13 N.Y.U.L.Q. Rev. 1, 15 (1936) (“Contract was the perfect circle that must be marred by no indentation or protuberance.”).

⁹³ Pollock, Frederick, Sir. *The law of torts: a treatise on the principles of obligations arising from civil wrongs in the common law.* (London 1887), 432 et seq.

⁹⁴ The context is the question whether a plaintiff may have “Alternative forms of remedy on the same cause of action.” Id. at 433. Pollock quite rightly dismisses this as a formal problem of little practical significance.

⁹⁵ The case is *Denton v. Great Northern Railway Co.*, 5 E.&B. 860, 25 L.J.Q.B. 129 (1856).

⁹⁶ Id. at 439 footnote (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. *Principles of contract: being a treatise on the general principles concerning the validity of agreements in the law of England.* 4th ed. (London 1885). The gist of Pollock’s argument is that there is no space in contract for an “in choate or unascertained obligation” (id. at 20) or a “floating contract with [an] unascertained person.” (id. at 19).

⁹⁷ 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 did look 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’ treatise. The general principles and specific materials on contracts founded on trust and confidence are unchanged. Theophilus Parsons. *The law of contracts.* (8th ed. edited by Samuel Williston) (Boston 1893), Vol. 1, at 463-464.

persons with the intention to affect their legal relations.⁹⁸ An American Wharton (1882) explicitly builds on the work of the English treatise writers Pollock, Leake, and Anson, while commenting English jurisprudence is more beholden to “free trade principles” than American jurisprudence.⁹⁹ Wharton follows civilian writers and the logic of the will theory to a conclusion not reached by Pollock. Wharton takes the position liability for loss consequent on a plaintiff’s reliance on a defendant’s negligent misstatement of assent to contract is not contractual (there was no meeting of the minds) but rather is a species of negligence or deceit.¹⁰⁰ Williston, whose treatise is much later (1920), embraces Pollock’s conception of contract, taking the position “there can be a contract only so long as something yet to be done, or some duty remained yet owed”¹⁰¹

Early critics of classical theories of contract do not question the definition of the field.¹⁰² Arthur Corbin in a 1917 article 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.”¹⁰³ The goal is to identify the acts “which will cause society to come forward with its strong arm.” This conception of contract leads Corbin to exclude from contract a barter exchange of goods as well as gift.¹⁰⁴ The difference between a barter exchange by A of apples to B for money and a contract between A and B to exchange apples for money is that, in the latter case, “if B fails to keep his promise, society at A’s request will exercise compulsion against B, but will exercise compulsion against no other person.”¹⁰⁵ Corbin prefaces all of this with the caveat he adopted this definition of contract only “as a matter of convenience.”

Classical theorists and the early critics of classical theories almost universally agree Beale’s cases are not part of contract law. Beale is unusual in arguing that neither are they part of tort law.¹⁰⁶ Many, like Pollock, do

⁹⁸ William R. Anson., *Principles of the English law of contract*. (Oxford 1879). This appears to follow Pollock, even to adding 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 includes 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.

⁹⁹ Francis Wharton, *A commentary on the law of contracts*. (Philadelphia 1882).

¹⁰⁰ *Id.* Vol 2, pp. 385-393.

¹⁰¹ Arthur L. Harding, Williston’s Fundamental Conceptions of Contract, 2 *Mo. L. Rev.* 219, 225 (1938).

¹⁰² Similarly George P. Costigan, Implied-in-Fact Contracts and Mutual Assent, 33 *Harv. L. Rev.* 376, 379 (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, “The 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”

¹⁰³ Arthur Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 *Yale L.J.* 169, 170 (1917).

¹⁰⁴ *Id.* at 171-172.

¹⁰⁵ *Id.* at 173.

¹⁰⁶ 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 as wrongs

not mention the cases. Theorists who explain why the cases are excluded from contract disagree on the reason. While none of the reasons is compelling by itself,¹⁰⁷ together they mark off Beale's cases from the canonical case of contract, making it difficult to describe the problem as contractual. Williston and Holmes say the problem is there is no consideration, explaining that a plaintiff's entrusting his property, money, or person to a defendant is not consideration because there is no bargain.¹⁰⁸ Corbin says the problem is there is no promise from the defendant to the plaintiff to assist the plaintiff.¹⁰⁹ Some theorists divide obligations between those that depend on consent and those that do not, and reject the possibility of hybrid obligations that ground on a voluntary undertaking but are given content by courts. For example, John Innes Clark Hare says 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 law, which will not suffer it to be made less or greater than justice and good faith require."¹¹⁰ 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 is so strong that theorists of the late 19th and early 20th century tend to push problems at the core of the field that do not conform to the theory outside of contract to be dealt with by other bodies of law. For example, Wharton takes the position that the

independent of contract (London 1873), 24-28. Underhill may have taken the label quasi-tort from Robert J. Pothier. A Treatise on Obligations, considered in moral and legal view from the French of Pothier (Newbern, N.C. 1802), at 73. Pothier equates quasi-torts as wrongs done without fraud or malice "but through inexcusable imprudence" causing injury to another.

¹⁰⁷ 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 Samuel Williston, *The Law of Contracts* (1920), Vol 1 at 3-5.

Williston's view that contract strictly defined requires bargained for consideration did not prevail. The gratuitous bailment and gratuitous agency cases are cited as an important antecedent for the doctrine of promissory estoppels. See Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents-I*, 50 Mich. L. Rev. 639, 665-674 (1952); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents-II*, 50 Mich. L. Rev. 873, 873-883 (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. Felix Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 575-77 (1933), is a good touchstone for this.

¹⁰⁸ Williston, *Contracts* (1st ed. 1920), vol. 2 at 1951. Williston equates the "idea of promissory estoppel" with tort. Vol. 1, at 192.

¹⁰⁹ Case Comment, *Consideration for Promises by a Gratuitous Bailee*, 32 Yale L.J. 609 (1923). The comment is on *Siegel v. Spear*, (N.Y. 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 while contrasting the duties of a gratuitous bailee in the absence of a promise.

¹¹⁰ John Innes Clark Hare, *The Law of Contracts* 129-130. 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 misfeasand, nor be bound by an agreement to insure the property confided to his case." *Id.* at 130.

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* from civil law. Similar arguments are made in less doctrinal terms by the generation of scholars who break away from classical theories, including Roscoe Pound, Clarke Whittier,¹¹¹ and George Gardner.¹¹² Driving their arguments is a substantive view that it is unfair and unnecessary to mulct an actor who makes an apparent but unintended promise if the accidental promise causes no harm. Whittier and Gardner use essentially the same analytical methods and pursue essentially the same goals as the classical theorists, though Gardner is more openly self-conscious about the limitations of the analytical method and the intractability of the underlying issues. Pound takes a broader and more skeptical view of the conceptualist enterprise.

Pound's scholarship on private law theory is published before 1925. Whittier and Gardner's articles book end the Hoover administration. In the 1930s and early 1940s there is a cascade of internal and external challenges to classical theories of contract. The challenges go both to the theories' basic premises and to specific features of contract law that follow from these premises. But the critics of classical theories largely accept the definition of the scope of the field of contract as being about the making, enforcement, and adjustment of future-regarding promises and agreements. This feature of contract theory comes under a systematic criticism only fairly late in the 20th century by "relational contract theory" and by critical legal theory.¹¹³

Glanzer v. Shepard is decided in 1921 as the tide is 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 is Pound's advice to the ALI Council

¹¹¹ Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 Cal. L. Rev. 441, 441-442 (1929).

¹¹² 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. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form*, 100 Colum. L. Rev. 94 (2000), unearths it 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 (at 22-23) 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 (at 23-25).

¹¹³ Jay Feinman makes this point in 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 to key assumptions: (i) "the focus of the inquiry is on a relatively discrete promise, one that can be analyzed in a distinct element of its setting"; and (ii) "the baseline condition of social and economic life is limited responsibility toward others." 61 Fordham L. Rev. at xxx.

three years later in a report on the classification of the law.¹¹⁴

C. Misrepresentation to preserve the contractual feature of the claim

In *Glanzer v. Shepard* Cardozo takes pains not to label the duty he finds to be a matter of “tort” or “negligence.”¹¹⁵ But others quickly use these labels.¹¹⁶ 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 the character of a plaintiff’s injury.¹¹⁷ *Glanzer v. Shepard* could be described as a negligence claim without undue difficulty. A negligence claim had three elements: an antecedent duty of care, breach, and harm.¹¹⁸ So long as one does not get hung up on whether an antecedent duty of care may be congruent with a contract with a third party, *Glanzer v. Shepard* is unproblematic for the defendant’s contract clearly establishes a duty.¹¹⁹ The instinct that negligence requires physical harm had not yet hardened into a hard and fast rule precluding negligence liability for pure economic loss. This raises the question why American legal theorists of the period treat the problem of negligently disseminating misleading information as a problem of negligent misrepresentation rather than simple negligence. Why tie the claim to misrepresentation? I will show in this Part one reason they did this is to express the claim’s contractual features.

The “vexed question of liability for negligent language”¹²⁰ is not addressed in a systematic way by courts and legal theorists until late in the 19th century. In *An Introduction to the Philosophy of Law* (1922) Pound attributes the “reluctance of courts to apply the ordinary principles of

¹¹⁴ Roscoe Pound, Preliminary Report to the Council on the Classification of Law (1924), at 44. 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. Benjamin N. Cardozo, *The Growth of the Law* (1924), 82, 111.

¹¹⁵ The comparison with *Ultramares* is striking for Cardozo begins the opinion “The action is in tort for damages suffered through the misrepresentations of accountants, the first cause of action for misrepresentations that were merely negligent.” 174 N.E. at 442.

¹¹⁶ Judge Andrews describes *Glanzer v. Shepard* as a negligence case in *International Products Co. v. Erie Railroad Co.*, 155 N.E. 662 (1927) (“In the second [referring to *Glanzer*] a like theory [of contract] was mentioned, but the recovery was placed on the ground of negligence.”) *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931), follows *Glanzer* and states the action “sounds in tort even though a contract was involved.”

¹¹⁷ Bernard Rudden, *Tortiousness*, 6/7 *Tulane Civil Law Forum* 105 (1991-92). 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 (1920). Theorists threw up their hands at 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 for it.” John William Salmond, *Jurisprudence of the Theory of the Law* (London 1902), at 559. Holmes made a stab to do for Tort what the classical theory attempted to do for Contract—this is to come at the question of what is a tort from the perspective of the actor at the moment he or she commits a tortious act “considering only the principles by which the peril of his conduct is thrown on the actor.” Oliver Wendell Holmes, Jr., *The Common Law* 79 (1881).

¹¹⁸ D.J. Ibbotsen, *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*, 229, 234 (E.J.H. Schrage, ed. 2001).

¹¹⁹ The earliest Tort treatises assume that a case of action lies in Tort as well as Contract for “neglect of a duty” founded upon a Contract. Charles G. Addison, *Wrongs and their remedies*, being a treatise on the law of torts (London 1860), at v.

¹²⁰ *International Products Co. v. Erie Railroad Co.*, 155 N.E. 662 (1927).

negligence to negligent speech” to “the attitude of strict law in which our legal institutions first took shape” 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 conduct are applied rigorously thereto.”¹²¹ The common law and equity long had devices for holding an actor responsible for careless speech in a transaction benefitting the actor,¹²² and for holding an actor liable for loose speech that puts a plaintiff in the way of physical harm.¹²³ *Paisley v. Freeman* (1789) is the first occasion in which an English court prominently addresses liability for misleading another in a context involving neither a transaction benefitting the deceiver at the expense of the deceived nor physical harm. The case presents 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 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.¹²⁴ It seems the question did not cross anyone’s minds.

Liability for financial harm caused by careless speech is a hot question by the late 19th century. In England the House of Lords forecloses a deceit claim absent a finding of dishonesty in *Derry v. Peek*.¹²⁵ English cases following closely on the heels of *Derry v. Peek* holds its logic also bars 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 object to these decisions on doctrinal and moral grounds. They argue American courts had imposed liability in cases similar to *Derry v. Peek* by stretching deceit, typically using a presumption that a defendant knows a fact he communicates is false if the defendant’s position places him under a duty to determine the truth of the matter and gives him the means to do

¹²¹ Roscoe Pound, *An Introduction to the Philosophy of Law* 280 (1922). Pound’s reference to “strict law” appears to be 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.

¹²² Samuel Williston, *Liability for Honest Misrepresentation*, 24 *Harv. L. Rev.* 415 (1911), is a good background on the use of doctrines such as warranty, rescission, and estoppel to reach negligent misrepresentation in a contractual setting and even innocent misrepresentation.

¹²³ *Ibbotson* supplies some examples.

¹²⁴ A divided court allows the claim. Grose, J., dissenting, notes the unprecedented nature of the claim and argues that if the claim is allowed it will lead to a flood of claims against by-standers who recommend contracts that turn out to be ill-advised. The majority’s response to this worry makes it clear that no-one thought liability for careless speech was on the cards. The response is that the claim was a novelty because it was that the defendant knowingly misled the claimants’ about the buyer’s creditworthiness with the intention to induce the claimants to extend credit, from which it could be inferred that the defendant had an interest in misleading the claimants or (even worse) that he acted out of malice. The claim may not have been quite so novel. Baker, *The Oxford History of the Laws of England 1483-1558*, at 773 n. 44 reports two cases pleading deceit involving misleading character references.

¹²⁵ (1889) 14 App. Cas. 337 (H.L.).

so.¹²⁶ As for the morality of the matter, Williston writes “The 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 expected, every moral reason exists for holding the defendant liable.”¹²⁷ Jeremiah Smith argues the only good reason for refusing to impose liability in cases similar to *Derry v. Peek* is the difficulty of establishing a “stopping-place short of enforcing a legal duty to use reasonable care in making all statements.”¹²⁸

American legal theorists of the time disagree about where to situate the liability rule in the law.¹²⁹ Francis Bohlen and Leon Green square off on this issue in the early 1930s. The first shot is a 1929 article by Bohlen arguing the problem should be treated in the context of the law of negligence and not in the context of the law of deceit or warranty.¹³⁰ Bohlen’s reasons for treating the problem as one of negligence may come as a surprise. He does this to import liability-limiting features of negligence law that have since eroded. One such feature is the defense of contributory negligence.¹³¹ The other is a rule akin to a rule in the law of landowner-liability at the time 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.¹³²

¹²⁶ Jeremiah Smith, *Liability for Negligent Language*, 14 *Harv. L. Rev.* 184, 191-192 (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* (Boston 1877), at 57-63. 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 the cases “may mostly be embraced under the general proposition, that a man is supposed and required to know all matters pertaining to his business.” *Id.* at 57. Williston, after reviewing much of these materials, concludes that is unclear whether the doctrine extends beyond cases “where the profit of the misrepresentation enures to the benefit of the defendant, or he is a party to a contract with the plaintiff induced by the misrepresentation.” He goes “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. Samuel J. Williston, *Liability for Honest Misrepresentation*, 24 *Harv. L. Rev.* 415, 433-434 (1911).

¹²⁷ Samuel Williston, *Liability for Honest Misrepresentation*, 24 *Harv. L. Rev.* 415, 435 (1911).

¹²⁸ Jeremiah Smith, *Liability for Negligent Language*, 14 *Harv. L. Rev.* 184, 194 (1900).

¹²⁹ Samuel Williston, *Liability for Honest Misrepresentation*, 24 *Harv. L. Rev.* 415, 436-437 (1911), objects to treating the problem as one of negligence “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.” He concludes the problem is dealt with in the context of warranty and estoppel. For a case employing estoppel see *Conway Nat. Bank v. Pease*, 76 N.H. 319, 82 A. 1068 (1912). A later case from the same court that is contemporaneous with *Glanzer* recharacterizes the theory as negligent misrepresentation. *Weston v. Brown*, 82 N.H. 157, 131 A. 141 (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.

¹³⁰ Francis H. Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 *Harv. L. Rev.* 733 (1929).

¹³¹ *Id.* at 739-740.

¹³² *Id.* at 741-743.

Green responds to Bohlen in a 1930 article *Deceit*.¹³³ The article is remembered for its heady legal realism. Green observes that the legal definition of the scienter of deceit is sufficiently varied across jurisdictions and is sufficiently “elastic” to “allow the broadest range, both in the exercise of the court’s own judgment and in permitting the employment of the jury.”¹³⁴ Green argues the definition is elastic enough to permit a court to put a claim of inadvertent misrepresentation to a jury if the defendant’s conduct seems sufficiently culpable, and to allow the jury to find liability. Turning to Bohlen’s article, Green argues “the negligence network of legal theory was developed through cases involving hurts to the physical integrity of person and property” and may not be “adequate or adaptable for the cases involving unintentional misuse of words in business transactions.”¹³⁵ Green continues, 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.”¹³⁶ He concludes by disparaging the possibility of devising formulae better than those already found in the law of deceit to define when an actor is subject to liability for inadvertently misleading another in a business transaction.¹³⁷

Bohlen responds to Green in a 1932 article.¹³⁸ Mostly Bohlen takes Green to task for arguing that courts should address negligence using “legalistic”¹³⁹ subterfuge—or “hocus pocus”¹⁴⁰—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 realized 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.”¹⁴¹

¹³³ 16 Va. L. Rev. 749 (1930).

¹³⁴ *Id.* at 757.

¹³⁵ *Id.* at 758.

¹³⁶ *Id.* at 759.

¹³⁷ *Id.* at 761-762.

¹³⁸ Francis H. Bohlen, Should Negligent Misrepresentation Be Treated as Negligence or Fraud?, 18 Va. L. Rev. 703 (1932).

¹³⁹ *Id.* at 712.

¹⁴⁰ *Id.* at 711.

¹⁴¹ *Id.* at 718-719. 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. Additional Explanatory Notes, Torts Preliminary Draft (tpw.) No. 79 (July 11, 1935). Prominent among these cases is *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) (“A like principle applies,

Bohlen continues “intent . . . requires that the representation shall be made for the purpose of inducing the plaintiff to act.” He notes 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 courts will extend the liability for merely negligent misrepresentations beyond that to which they will carry responsibility for the more culpable, conscious and dishonest misstatements.”¹⁴² A few years later Bohlen, as Reporter for the part of the Restatement of Torts covering misrepresentation, includes the requirement of intended reliance in the black letter. The Comments explain the requirement comes from the law of deceit.¹⁴³

I believe the answer to my question “Why negligent misrepresentation?” lies partly in Green’s critique of Bohlen and partly in Bohlen’s response. Green draws the more obvious and general connection. His point is that the problem of inadvertent misstatement in a business context is far afield from problems traditionally dealt with by negligence law and is closer to problems traditionally dealt with in the law of deceit, particularly 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. Green anticipates the view that negligence law addresses accidental physical harm.

Bohlen draws a more subtle and specific connection. Bohlen ties liability for negligent misleading another to deceit, characterizing both as

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 Jeremiah Smith, *Liability for Negligent Language*, 14 Harv. L. Rev. 184, 196-197 (1901). Smith notes the stringency of a requirement that the “Defendant 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.” 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.” 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.”

The rule of intended reliance might still have done some useful work in the law of deceit in answering in the negative the question whether it is wrongful for an actor to knowingly disseminate false information when the actor does not intend or expect anyone to alter their 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.

¹⁴² *Id.* at 720.

¹⁴³ Preliminary Draft No. 79, Part 2, Restatement, Torts, at 91 (July 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.”

This appears as Comment *a* in Restatement Torts Section 552, with some editing and substituting purpose for intent in the first sentence so 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.”

torts involving misrepresentation, to import a rule of intended reliance from the law of deceit as a limit on duty and scope of liability. Bohlen thought the rule of intended reliance in the law of deceit requires something like a contractual relationship or privity between a deceiver and a plaintiff for knowing deception to be actionable. Bohlen describes 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 is lost to us. Bohlen was able to make intended reliance an element of deceit in First Restatement of Torts, but the rule did not long survive in the law of deceit because it has unattractive and even bizarre consequences.¹⁴⁴ The rule lives on in the law of negligence misrepresentation. It reappears in the Restatement Second, Torts and is used by some courts and theorists to explain limits on duty and liability. While a rule of intended reliance explains easy cases¹⁴⁵ it is inadequate to the task. A rule of intended reliance is fraught with ambiguity in ways that invited reliance is not.¹⁴⁶ 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

¹⁴⁴ See Restatement, Torts Section 531. 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), and that *A* as well 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 called the immunity afforded *A* in both cases by the rule of intended reliance a "deformity in the law of deceit." 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 Warren Seavey celebrated Cardozo's assault on the traditional rule of no liability in *Ultramares*. 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.'" Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 *Colum. L. Rev.* 20, 52 (1939). The position of Cardozo, Keeton, and Seavey prevailed over the position taken by Bohlen in the First Restatement. This aspect of the scienter of deceit has been reduced to what is in essence a requirement of predictable reliance. See Fleming James, Jr. and Oscar S. Gray, *Misrepresentation-Part I*, 37 *Md. L. Rev.* 286, 289-296 (1977).

¹⁴⁵ 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 resulting in the loss. The easy case for no liability is where information is used in a way that a defendant could not reasonably have expected when supplying the information, 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.

¹⁴⁶ Does intent mean purpose or 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 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? Once we acknowledge that a duty may be owed and liability may exist though an actor is unaware of the specific identity of the plaintiff and of the specific transaction in which the plaintiff relies on the information—i.e., it is enough that an actor intends that information be relied upon by a class of persons in a class of transaction—the application of the rule depends upon whether a court defines the class of persons and the class of transactions intended to be influenced by the information broadly or narrowly.

the actor that that the recipient be able to rely on the information in the manner in which the recipient does rely.

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 impose liability for negligently misleading another under the rubric of deceit by 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.

IV. CONTRACT AND NEGLIGENCE IN THE 20TH CENTURY

This part brings the story of contract theory up to the present. It also introduces the negligence action, which crystallizes in the 20th century, and explores recent criticism of the dominant theory of negligence. My major point is that negligent misstatement is better handled as problem of contract than a problem of negligence as those fields now are conceived. I also say something about the best theories of contract and negligence and about what makes a good theory of a field of law.

A. Contract as private ordering

There always has been a space in American contract law, meaning the law applied by the courts, for claims based on mis-performance 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 beneficiary¹⁴⁷ and promissory estoppel,¹⁴⁸ which became widely available in the middle part of the 20th

¹⁴⁷ A typical case is similar to *Glanzer v. Shephard* 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*, 92 N.M. 26, 582 P.2d 403 (N.M. App. 1978); *Rodin Properties-Shore Mall, N.V. v. Ullman*, 264 A.D.2d 367, 694 N.Y.S. 2d 374 (1999); *Ramos v. Arnold*, 141 Wash. App. 11, 169 P.3d 482 (2007). Albert L. Wheeler, *Real Estate Malpractice Liability to Nonprivity Third Parties: Questioning the Applicability of Accountant Liability to Third Party Cases*, 25 *Real Prop. Prob. & Tr. J.* 723, 731-735 (1991), works through the law while observing 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 v. JGI Eastern, Inc.*, 154 N.H. 791, 917 A.2d 1250, 1255 (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. App. 1982); *Partout v. Harper*, 145 Idaho 683, 183 P.3d 771 (2008); *Emmons v. Brown*, 600 N.E.2d 133 (Ind. 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*, 56 Cal.2d 583, 364 P.2d 685 (1961)(claim by intended beneficiary of will for loss resulting from attorney's negligence in drafting will). It also does more work 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 information.. See, e.g., *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cambridge*, 171 Cal. App.4th 35, 89 Cal. Rptr. 473 (2009)(excess insurer harmed when primary insurer paid claim relying on defendant's negligent approval); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162 (3rd Cir. 2008)(Pa law)(merchants suing to recover their losses resulting from transactions using “hacked” credit information).

¹⁴⁸ An example is the 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 the misstated terms. See,

century, are the usual vehicles for such claims today. But the claims go further back in other forms, such as warranty and equitable estoppel.¹⁴⁹ Some types of informal undertakings based on invited reliance were routinely treated as enforceable agreements without recourse to more specialized doctrines by simply implying a promise to use due care.¹⁵⁰

Changes in American contract law in the 20th century make it even easier to describe a duty of care based on invited reliance as contractual. During the 20th century American courts generally took a more contextualist and less formalist approach to determining the existence and content of contractual obligation. The emergence of promissory estoppel as a basis for recovering damages for non-performance of an incomplete or otherwise imperfect commercial agreement is an important part of this story.¹⁵¹ American contract theory has moved along with contract law. Today “reliance theories” of contract compete with “promise theories” of contract.

e.g., *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (1984); *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208 (1969); *Youngblood v. Auto-Owners Ins. Co.*, 111 P.3d 829 (Utah App. 2005). Other cases describe the theory as promissory estoppel. See, e.g., *Traveler’s Indemnity Co. v. Holman*, 330 F.3d 142, 151 (5th Cir. 1964); *Midamar Corp. v. National Ben-Franklin Ins. Co. of Ill.*, 898 F.2 1333, 1337 (8th Cir. 1990)(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.*, 349 Ark. 9, 75 S.W.3d 696 (2002).

¹⁴⁹ Williston tried to fit warranty and estoppel claims in contract law as he conceived the field albeit with a bit of conceptual slight 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.” Samuel Williston, *The law of contracts* 22 (New York 1920). This is expressed in Restatement, *Contracts* § 20 (“neither . . . real or apparent intent that the promises shall be legally binding is essential.”) See Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L.Rev. 1726, 1750-1756 (2008).

The sticking point for Williston is the lack of a forward looking commitment. He tries 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.” Samuel Williston, *The law of contracts* 30 (New York 1920). Williston does not explain how a person could “in effect” agree to be liable for damages for a misrepresentation without thinking about the legal consequences if the representation might be false.

¹⁵⁰ *Mayhew v. Glazier*, 68 Colo. 350, 189 P. 843 (1920), illustrates. Glazier gave Mayhew, an agent for National Union, an application for hail insurance and a promissory note for the premium. Glazier testified that Mayhew assured he would have the policy issued without delay. Mayhew dallied and the crop was damaged by a hail storm before Mayhew submitted the application and note. The trial court found that it was clear to all that Mayhew was not acting on behalf of National Union when he took the application and note and made the assurances. 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.

¹⁵¹ See, e.g., *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill.2d 46, 906 N.E.2d 520 (2009)(representation to prospective purchaser of dealership that it would be made a dealer if it purchased existing dealership); *Olympic Holding Co., LLC v. ACE Ltd.*, 122 Ohio St.3d 89, 909 N.E.2d 93 (2009)(allowing promissory estoppels 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.*, 26 Wis.2d 683, 133 N.W.2d 267 (1965). A few states have rejected promissory estoppel as an action. See *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 514, 492 S.E.2d 512 (1997). Virginia does not recognize an action for negligent misrepresentation, though some of the ground is covered by constructive fraud. *SuperValu Inc. v. Johnson*, 276 Va. 356, 666 S.E.2d 335 (2008). Yorio & Thel, *The Promissory Basis of Section 90*, 101 Yale L.J. 111 (1991) Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. Chi. L. Rev. 903 (1985).

While some theorists favor one theory over the other many embrace theoretical pluralism as being both descriptively accurate and normatively appealing.¹⁵²

Still the softened field remains recognizably distinct from tort law, notwithstanding rhetorical claims to the contrary by Grant Gilmore in the *Death of Contracts* and Patrick Atiyah in *The Rise and Fall of Freedom of Contract*.¹⁵³ 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 absence of consideration and the absence of definite terms. In some states it can override a statute of frauds defense. Everywhere reliance-based theories of damages are available 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. The possibility of private ordering is preserved for an actor may avoid reliance-based liability by disclaiming legal responsibility.¹⁵⁴

Negligent misrepresentation has a natural home in contract alongside promissory estoppel. The claim could be covered by adding 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 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

¹⁵² Robert A. Hillman, *The Richness of Contract Law* (1997), is a comprehensive pluralist account that uses these terms to divide the field. Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U.L. Rev. 1726 (2008), is a pluralist account that contrasts the view of contract law as power-creating and the view of contract law as duty-imposing. Klass offers a “creation myth” of a body of law that begins a 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. Stephen A. Smith, *Contract Theory* (Oxford 2004), helpfully classifies reliance and promise theories as addressing the analytical question “What causative event is the basis of contract?,” distinguishing this from the normative question “Why give legal force to contractual obligations?” Smith argues a promissory/rights-based theory best fits contract law.

¹⁵³ Grant Gilmore, *The Death of Contract*; Patrick Atiyah, *The Rise and Fall of Freedom of Contract*. 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 is to assume that either an obligation must be wholly the product of a person’s will or it is wholly the product of a court’s will.

¹⁵⁴ Richard Craswell, *Two Economic Theories of Enforcing Promises*, *The Theory of Contract Law* (Benson ed. 2001), 19, 42-44, makes this point in answering Atiyah’s claim that “[a]s soon as liabilities came 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 door is opened to a species of liability which does not depend upon a belief in individual responsibility and free choice.” Quoting Atiyah, *The Rise and Fall of Freedom of Contract* 6-7.

liability are of two types. One questions the possibility of delimiting the causative events of reliance-based liability so that a rule of reliance-based liability does not collapse into a doctrine that empowers a court to shift losses between parties whenever loss-shifting seems fair or good policy. Thus Stephen Smith observes that 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.” Smith argues these concepts are normatively opaque and ambiguous so that liability ends up turning on an amalgam of imprecise factors.¹⁵⁵ Limiting reliance-based liability to invited reliance avoids this objection. The concept is no more opaque or ambiguous than the concept of a promise. While the concept of invited reliance is more subtle than the concept of a promise there is good reason to hold courts will be able to understand the concept and to abide by it for invited reliance succinctly describes a centuries-old basis of obligation.

The other objection is that liability based on invited reliance lacks an essential feature of contract. This is 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.¹⁵⁶ 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* for a promise is future regarding. An important difference is that a promise restricts *A*'s freedom of action in the future. This is a momentous thing. If *A* invites *B* to rely on a statement *x* it is unlike *A* warranting *x* to *B* for 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. Similarly, 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 coercive power of the state to back up a representation or promise. Much of contract law exists precisely to identify such momentous undertakings and to delineate their legal consequences. A partial list of rules that serve these functions includes the rules on offer and acceptance, contract formalities, rules like consideration that exclude from contract social undertakings that do not have legal consequences, and rules on excuse. Much of contract law truly is about private legislation.

The mistake Smith and Benson fall into is the same one that was made

¹⁵⁵ Stephen A. Smith, *Contract Theory* (Oxford 2004), 81-82.

¹⁵⁶ Peter Benson, *The Unity of Contract Law*, in *The Theory of Contract* (Benson ed. 2001), 118, 174-175. Cf. Arthur Leff, *Contract as a Thing*, 19 *Am. U.L. Rev.* 131 (1970). Leff is being ironic. Benson is not.

by classical theorists. Smith is a good target here for he is clearer than most about what he wants out of theory of contract. Basically he argues that a good theory should make most of the core features of the law of contract intelligible by relating them to a single attractive moral principle in a way that corresponds to the self-understanding of users of contract law of the law's purposes.¹⁵⁷ It is difficult to disagree with this if it is possible to come up with a theory that fits this bill. 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 and an even narrower theory of contract that conceives of the field as rules to facilitate private law-making even more strictly defined. In a beauty contest Pollock's theory of contract might well beat out Smith's theory.¹⁵⁸

The mistake lies in an unstated assumption. This is that the best theory to define the core of contract must also define the periphery of the field. Smith falls into this trap when he argues 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 . . ." ¹⁵⁹ Smith goes on to argue simultaneous exchange is best treated outside of contract law because any theory capacious enough to include it would also include "various acts that arguably should be kept outside," such as a gift.¹⁶⁰ And he argues there is no practical need to account for simultaneous exchange as a problem of contract because the problem can be adequately dealt with by the law of unjust enrichment or negligent misstatement.¹⁶¹

Smith's assumption is defensible if one takes as the goal coming up with the best theory of contract. It is difficult to defend if the goal is to come up with the best 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.¹⁶² This list is a bit misleading for few people

¹⁵⁷ Stephen A. Smith, *Contract Theory* 7-32 (2004).

¹⁵⁸ An intended 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. An intended forward-looking commitment that is intended to be acted upon by another (i.e. a promise) is 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) is 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 is further from the core in the dimension of retaining some flexibility regarding performance. An apparent but unintended forward looking commitment is a rather large step from the core in the dimension of being an unwilled obligation. A duty of care based on invited reliance is distant from the core on all of these dimensions.

¹⁵⁹ *Id.* at 176 (emphasis in original).

¹⁶⁰ *Id.* at 177.

¹⁶¹ *Id.* at 178-179.

¹⁶² Peter Birks, *Equity in Modern Law: An Exercise in Taxonomy*, 26 *Univ. Western Australia L. Rev.* 1, 10 (1996); Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 *Tex. L. Rev.* 1769, 1771 (2001).

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). 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.¹⁶³ 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 contemplation, unnoticed, unmissed, unmourned—and *unaccounted for*."¹⁶⁴ 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 either we live with some sloppiness in the theory we use to define a field or we live with some sloppiness in the specification of the periphery of the field. We can have a tight theory to define a field and a fuzzily defined periphery or we can have a fuzzy theory to define a field. 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. A tight theory will always beat out a fuzzy theory in explaining the core. If I am right about this, then 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

¹⁶³ For a persuasive argument that the core case of unjust enrichment is a mistaken payment of money see Peter Birks, *Unjust Enrichment* (2nd ed. 2005). Only a simultaneous exchange that has gone dramatically awry is handled anything like a mistaken payment of money. I expect Smith is thinking 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 if 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 gift?

¹⁶⁴ Karl Llewellyn, *What Price Contract* Id. at 704-5 (emphasis in the original).

alternatives. I take these 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 the 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 and invited reliance. Why not negligence then?

*B. The rise of negligence
liability for harm carelessly caused*

To understand the arguments for and against treating negligent misstatement as a problem of negligence you need to appreciate the historic arc of the negligence action. Percy Winfield observes, looking back to the 18th century, liability for carelessly caused harm begins in cases in which “Duty was repeatedly taken for granted and consisted in the defendant either having put himself in a position in which any sensible man would act carefully (e.g. assuming control of dangerous things) or in having assumed something like a *status* which demanded professional skill on his part.”¹⁶⁵

During the 19th 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.¹⁶⁶ The language of duty first appears in the privity cases, which hold duty in a contractual undertaking runs only to parties to the contract.¹⁶⁷ This parallels developments in the 20th century. Duty is treated as an issue in negligence cases generally only in its absence. Late 19th century English treatise writers debated whether there is a unified, general duty of care or numerous situation-specific duties.¹⁶⁸ This question was resolved in principle by English courts in 1932 in *Donoghue v. Stevenson*,¹⁶⁹ which states a general

¹⁶⁵ Percy H. Winfield, Percy H. Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 35, 48 (1934). The pre-19th 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.

¹⁶⁶ *Id.* at 49-51. *Vaughan v. Menlove*, 3 Bing. (N.C.) 468 (1837), is frequently given as an example of the expansion of negligence. D.J. Ibbetson reports courts typically imposed negligence liability in a conservative, incremental fashion by analogizing to previously established cases of liability.

¹⁶⁷ *Winterbottom v. Wright*, 10 M.&W. 109 (1842). Winfield explains the decision is anticipated by *Langridge v. Levy*, 2 M.&W. 519 (1837), which found a vendor of a defective liable to the son of the buyer, who was injured when the gun misfired, on a theory of deceit. Baron Parke explicitly rejected the plaintiff’s effort to ground the claim on broader principle of liability. Pollock thought the result in *Winterbottom v. Wright* was due to the fact the plaintiff had not pled careless work.

¹⁶⁸ 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* (Schrage ed. 2001) 229, 241-243, 260-263.

¹⁶⁹ [1932] A.C. 562. The case came from Scotland. 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*, 11 Q.B.D. 503 (1883). Five years later in *Cann v. Wilson*, 39 Ch. D. 39 (1888), 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. *La Lievre v. Gould*, 1 Q.B.D. 481 (1893), backtracked by holding a surveyor not liable to mortgagees for inadvertently falsely

duty of care. Looking back over the development of the negligence action in English law, D.J. Ibbetson observes “By around 1970 the law of negligence was beginning to be conceptualized in terms of an ocean of liability for carelessly causing foreseeable harm, dotted with islands of non-liability, rather than as a crowded archipelago of individual duty situations.”¹⁷⁰ American negligence law evolves in the same direction as English law over roughly the same period.¹⁷¹ So two 1955 California cases have been described as “the California equivalent” of *Donoghue v. Stevenson*.¹⁷²

The generalization of duty is only part of the story of the rise of the negligence action in the 20th century. As important is the erosion of major liability-limiting doctrines.¹⁷³ 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. The shield of non-privity is eliminated first in cases involving defective goods, e.g. *Donoghue v. Stevenson* and *McPherson v. Buick Motor Co.* Later cases gradually extend this to construction and services.¹⁷⁴

Also important is the erosion of rules of superseding cause, which absolve a defendant from liability to a plaintiff when the immediate cause of the plaintiff’s harm is the misconduct of a third party.¹⁷⁵ The Restatement

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.

¹⁷⁰ 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* (Schrage ed. 2001) 229, 264.

¹⁷¹ I could not find an American treatise espousing a general principle of duty. American authors who address the question give up. For example, H. Gerald Chapin, *Handbook of the Law of Torts* (Minn. 1907) 499, 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* (Austin, Texas 1907), shows tort law continued to be thought of by some legal scholars 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.

¹⁷² W. Jonathan Cardi and Michael D. Green, *Duty Wars*, 81 S.C.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, *Torts: Liability for Physical Harm* § 7 (2009) 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. Preliminary Draft No. 1, Restatement Third, *Torts: Liability for Physical Harm* (May 12 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.

¹⁷³ Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601 (1992), makes this point.

¹⁷⁴ See, e.g., *Bush v. Seco Electric Co.*, 118 F.3d 519 (7th Cir. 1997)(Indiana law)(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).

¹⁷⁵ *Meyering v. General Motors Corp.*, 275 Cal. Rptr. 346 (Cal. 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

Third, Torts: Liability for Physical and Emotional Harm reduces the remnants of the law superseding cause either 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.¹⁷⁶ The cumulative effect of these developments is to open the door to negligence claims for conduct that no would have thought possibly actionable as recently as fifty years ago. Striking recent examples are negligence claims against suppliers of snub-nosed guns and exploding bullets by crime victims on theories of negligent marketing.¹⁷⁷

During the latter half of the 20th century courts begin 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.¹⁷⁸ The

courts as well as most other jurisdictions . . . that an intervening criminal act is by its very nature superseding cause.” *Id.* at 348-349. 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.

¹⁷⁶ Restatement Third, Torts: Liability for Physical Harm § 19. *Meyering v. General Motors Corp.*, 275 Cal. Rptr. 346 (Cal. App. 1990), is a wonderful window into this body of law. 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 superseding cause.” *Id.* at 348-349. 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.

¹⁷⁷ *McCarthy v. Olin Corp.*, 119 F.3d 148 (2nd Cir. 1997); *Hamilton v. Beretta U.S.A. Corp.*, 705 N.E.2d 1055 (N.Y. 2001).

¹⁷⁸ *Biakanja 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 claimant, the foreseeability of harm to him, the degree of certainty that the claimant 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.” 320 P.2d at 19.

Over the next quarter century the California Supreme Court used the *Biakanja* balancing test to hold an attorney owes a duty of care to the intended beneficiary of will, *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961); to hold a lender owes a duty of care to home buyers to ensure a thinly capitalized developer does not build defective homes, *Connor v. Great Western Sav. & Loan Assn.*, 447 P.2d 609 (Cal. 1968); to hold 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, *Barrera v. State Farm Mut. Auto. Ins. Co.*, 456 P.2d 674 (Cal. 1969); and, to hold a construction contractor owes a duty of care to a tenant to work promptly when dilatory work results in lost profits to the tenant, *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979). At the time *J'Aire* seemed a signpost of greater things to come. Robert Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 *Stan. L. Rev.* 1513 (1985), 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

pendulum swung in the 1980s. Today most everywhere in the United States, including California, there are general rules of no liability for pure economic loss subject to narrow exceptions.¹⁷⁹ There also is a pushback to limit the reach of the negligence principle in cases involving physical harm. An example is the rules fashioned to dismiss the aforementioned negligence claims against suppliers of snub-nosed guns and exploding bullets. To some extent changing political and social winds explains the expansion of negligence liability in America in the 1960s, 1970s, and early 1980s and its contraction thereafter. There also are less clearly political forces at work. Some cases that appear to cut back on negligence liability actually preserve the status quo by devising new rules to avoid applying the negligence principle to its logical limits. The economic loss rule is one such rule.

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.¹⁸⁰ 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. It queues up the normative questions by isolating them from factual questions while tying the normative questions to the factual questions in a way that focuses presentation and analysis of a claim. It leaves a decision-maker free to resolve the normative questions based on whatever values the decision-maker thinks relevant in a situation. The openness and flexibility of the concept of reasonableness gives the principle much of its normative power and appeal. Disagreements about the goals of negligence law and the weights to be assigned to conflicting goals can be set to the side to 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 private-legislation through contract to pursue almost any end they desire. The negligence

to the actor’s fault. *J’Aire* and *Biakanja* are keystones in Professor Rabin’s legal argument.

¹⁷⁹ See n. xxx supra.

¹⁸⁰ 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., *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998); *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997). The Restatement Third, Torts: Liability for Physical Harm § 7(a) 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.” 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 with the scope of liability, unless the court determines that the ordinary duty of care is inapplicable.” Comment f to § 6 notes the equivalence of the two propositions.

principle queues up the question whether a loss is unreasonably caused by an actor while leaving it to the court or jury to decide whether and why conduct is unreasonable based on their own values. 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 economic grounds. And both principles generate a surrounding apparatus of technical concepts that make them feel appropriately legal.

There are profound differences between the negligence principle and classical theories of contract. Classical theories conceive of contract as a means to enable people to determine amongst themselves the rights and obligations they owe each other while 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.¹⁸¹ 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.¹⁸² To preserve other bodies of law from negligence it must be kept in its place. But what is its place?

C. Negligence antagonists

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. Their target is a theory that permits a court to impose liability for harm unreasonably caused based on an all-things considered judgment that emphasizes the regulatory effects of liability. They argue the dominant theory over-simplifies 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 this runs “roughshod over standard ways of understanding responsibility [and] may even threaten to the particular notion of wrongdoing that forms the core of tort law.”¹⁸³ One worry is obliterating fine-grained rules of duty and responsibility makes negligence liability less certain and predictable and gives judges and juries undue discretion. Goldberg and Zipursky criticize the simplification of

¹⁸¹ The term is from Percy Winfield, *The Restatement of Torts: Negligence*, 13 N.Y.U.L.Q. Rev. 1, 15 (1936) (“Contract was the perfect circle that must be marred by no indentation or protuberance.”) Winfield is referring to *Winterbottom v. Wainright* and its ilk.

¹⁸² Powers, *Border Wars*, 72 Tex. L. Rev. 1209 (1994).

¹⁸³ John C.P. Goldberg and Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 Wake Forest L. Rev. 1211, 1244 (2009).

negligence law in California as depriving duty “all of its texture and shape, thereby functioning as a blank check” empowering both progressive and conservative judges to pursue their own policy goals, “overstepping their proper role.”¹⁸⁴ Goldberg and Zipursky also worry the dominant theory blinds us to 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.”¹⁸⁵ 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.¹⁸⁶

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 goes to how one frames the negligence inquiry. In particular, if the fact 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, unless one particularizes the relevant duty-creating conduct and the relevant risk in ways that often seem to beg the question.¹⁸⁷

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 be dealt with as a problem of superseding cause. Today it often is

¹⁸⁴ John C.P. Goldberg and 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. 328, 334, 335 (2006).

¹⁸⁵ John C.P. Goldberg and Benjamin C. Zipursky, *Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657, 733 (2001).

¹⁸⁶ John C.P. Goldberg and Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 Fordham L. Rev. 1563 (2006).

¹⁸⁷ See Dilan A. Esper & Gregory C. Keating, *Putting ‘Duty’ in its Place: A Reply to Professors Goldberg and Zipursky*, 41 Loyola L.A. L.Rev. 1225 (2008); Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 Fordham L. Rev. 1529 (2006). *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928), illustrates the point. 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. Particularizing the duty and the risk makes 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 seem 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.

described as an example of an “enabling tort” (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 against the host under the dominant theory.¹⁸⁸ 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 that would be reduced based on the drunk’s degree of responsibility.¹⁸⁹ Goldberg and Zipursky observe 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.¹⁹⁰

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.”¹⁹¹ 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 a drunk driver just does bear sole moral responsibility. 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.”¹⁹² 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 legal doctrine and moral norms of conduct are fluid and often are inconclusive. They also accept judges can influence moral norms of conduct through the power to make tort law. They

¹⁸⁸ Restatement Third, Torts: Liability for Physical and Emotional Harm § 7, comment a, 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.

¹⁸⁹ The logic is not followed to this extreme. Drinking companions have had some luck obtained damages reduced for comparative fault from a dramshop. See, e.g., *Baxter v. Noce*, 752 P.2d 240 (N.M. 1988).

¹⁹⁰ John C.P. Golderg and Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 *Wake Forest L. Rev.* 1211, 1225-1229 (2009).

¹⁹¹ Benjamin Zipursky, *Pragmatic Conceptualism*, 6 *Legal Theory* 457 (2000).

¹⁹² *Torts as Wrongs*, 88 *Tex. L. Rev.* at 976.

put two brakes on the fluidity and open-endedness of tort and negligence law. One brake is doctrinal incrementalism. They want courts to work within or at the margins of existing doctrines such as superseding cause. I will call the other brake 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)¹⁹³ that action *x* is a moral wrong against *B* with respect to *y*. 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.¹⁹⁴ For Goldberg and Zipursky a widely held belief *B* is morally obligated to rectify the harm is not enough for tort liability. There must be a widely held belief *B* has a moral obligation to *A* not to do *x*.

Robert Stevens is an important English critic of the dominant theory of negligence. Stevens sets as his target a conception of tort law as the body of law that protects against harm inflicted without a good reason.¹⁹⁵ 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 “rights of bodily safety and freedom” and “rights of property.”¹⁹⁶ Notably, economic expectancies not tied into personal and property rights are not rights a person may assert against the world. Other rights arise from a duty voluntarily undertaken by an actor and are good only against the actor who undertakes a duty.¹⁹⁷ According to Stevens, these duties can arise by contract or by a voluntary undertaking that bears a family resemblance to contract.¹⁹⁸ Stevens places the liability for negligent misstatement in this family.¹⁹⁹

Like Goldberg and Zipursky, Stevens objects to the open-endedness and generality of the negligence principle and 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

¹⁹³ 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. I will return to this point in Part V.

¹⁹⁴ Torts as Wrongs at 951-952.

¹⁹⁵ Robert Stevens, *Torts and Rights* (Oxford 2007), 1-3. The statement in text over-simplifies a bit. In Stevens own words “The law of torts is concerned with the secondary obligations generated by the infringement of primary rights.” *Id.* at 2.

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 9-10.

¹⁹⁸ *Id.* at 11.

¹⁹⁹ *Id.* at 33-35.

action.²⁰⁰ 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.”²⁰¹ Stevens 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.²⁰² 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. He limits what courts may do in the cause of protecting rights by insisting rights protected through tort law must be generalizable and specifiable such that “rights other have against us are capable of being determined in advance.”²⁰³ According to Stevens there can be no “general right not to be carelessly caused harm, with its boundaries determined by a rich array of policy concerns.”²⁰⁴ It is impossible for people to determine in advance when they will be held to have infringed upon this right.

Stevens, Goldberg, and Zipursky are reacting to what they see as the pernicious effects on tort law and negligence law of legal realism and the related turn to economic reasoning by legal theorists and some judges. Stevens is English so he can hope to find a haven from modernity in rights. 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 right-claims other might make against him. For Goldberg and Zipursky tort must ground in a moral norm in the form of a “thou shall not” command.

Their accounts of tort law would have been spot on as a descriptive matter more than a century ago. Most 19th century accounts of tort law organize it as does Stevens around personal and property rights and correlative wrongs. In the 19th century negligence liability existed only in cases in which a defendant “put himself in a position in which any sensible man would act carefully.”²⁰⁵ 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.

Nevertheless they supply compelling reasons to keep negligent misstatement apart from general negligence. Revanchist accounts of

²⁰⁰ Stevens interpretive analytical argument for why this is so is at pp. 291-297.

²⁰¹ *Id.* at 307.

²⁰² *Id.* at 308-312.

²⁰³ *Id.* at 339.

²⁰⁴ *Id.*

²⁰⁵ Courts rarely spoke of duty in negligence cases in the 19th century *Id.* at 48. Duty was a matter of common morality.

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 as 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. Treating negligent misstatement as a problem of general negligence makes otiose fine-grained distinctions in the law of negligent misstatement of the sort described in Part I that ground on a moral intuition that inviting reliance entails a duty of care. This is to be resisted for at least two reasons stressed by Goldberg, Zipursky, and Stevens. 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 is some evidence of the soundness of the rules. Of course these reasons assume the greater specificity of the rules adds meaningful substantive content. Whether the traditional rules of superseding cause add meaningful substantive content to the law of negligence seems debatable to me. Part I makes the case that a rule of invited reliance has a great deal of explanatory power in the law of negligent misstatement.

V. CODA: ECONOMIC NEGLIGENCE IN THE 21ST CENTURY

I am done with my argument for treating negligent misstatement as a claim akin to promissory estoppel in contract with its gist being invited reliance. 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 for 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.²⁰⁶ Often the absence of negligence liability is best explained in precisely these terms.²⁰⁷ In many no-liability cases most people would think a defendant committed a moral wrong against a plaintiff for

²⁰⁶ Stevens argues the policy arguments are makeweights and the real reason for denying liability in these cases is that there can be no right not to be carelessly caused pure 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. *Id.* at 339. This is an argument about what reasons ought to matter and 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. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917, 947-953 (2010). In other words they take the position breach of a moral norm of conduct is a necessary but not sufficient condition for tort liability.

²⁰⁷ For an extensive response to Goldberg and Zipursky along these lines see Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 *Fordham L. Rev.* 1529 (2006). Robert L. Rabin, *The Duty Concept in Negligence: A Comment*, 54 *Vand. L. Rev.* 787 (2001), makes a similar point.

which the defendant morally ought to make amends. Liability is not imposed for nakedly—some would say offensively—prudential and policy reasons despite the dictates of ordinary morality. In particular, a claim is denied even though the result seems unjust in a specific case because of the need for a bright-line rule and concerns for the cost and risk of error in processing similar claims in future cases.²⁰⁸ 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 be 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 descriptive matter when he argues liability for carelessly caused pure economic loss requires a voluntary undertaking.²⁰⁹ 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 fisherman who are deprived of their livelihood by negligent destruction of fisheries.²¹⁰ 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.²¹¹ And some cases hold a drug tester hired by an employer to screen employees owes a duty of care to the employees.²¹²

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

²⁰⁸ 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.

²⁰⁹ Stevens, *Torts and Rights*, at 33-37, 42-43.

²¹⁰ The right of commercial fishermen to recover is well-established. See, e.g., *Sea Clammers Ass'n v. New York*, 616 F.2d 1222 (3rd Cir. 1980)(New Jersey law); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156 (10th Cir. 1974)(Utah law); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981), aff'd on other grounds after rehearing en banc 752 F.2d 1019 (5th Cir. 1985); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D.Me. 1973)(Maine law); *Potomac River Ass'n v. Lundeberg Maryland Seamanship School, Inc.*, 402 F. Supp. 344 (D.Md. 1975)(Maryland law); *Carson v Hercules Powder Co.*, 402 SW2d 640 (Ark. 1966); *Connerty v. Metropolitan Dist. Com.*, 495 N.E.2d 840 (Mass. 1986); *Hampton v North Carolina Pulp Co.*, 27 S.E.2d 538 (N.C. 1943). Some cases allow non-fishermen to recover when they suffer a similarly distinct injury. *Great Salt Lake Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156 (10th Cir. 1974), 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 P2d 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.

²¹¹ See *Easton v. Strassburger*, 152 Cal. App.3d 901 (1984), *Berryman v. Riegart*, 175 N.W.2d 438 (Minn. 1970), and other cases collected at 46 A.L.R.4th 546 § 3.

²¹² See *Duncan v. Afton, Inc.*, 991 P.2d 739 (Wyo. 1999), and *Sharpe v. St. Luke's Hospital*, 821 A.2d 1215 (Pa. 2003). 89 A.L.R.4th 527 (1991) collects cases on both sides of the point as well as cases addressing other theories of liability, including defamation. *Newman & Fineman, Liability of a Laboratory For Negligent Employment or Pre-Employment Drug Testing*, 30 Rutgers L. J. 473 (1999), advocate 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.

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 conduct and harm and question are amenable to being redressed by the tools of civil litigation. 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. They leave 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 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.

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 *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*" to be 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 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.²¹³ The question "On reflection could *A*'s action *x* harming *B* be considered a moral wrong by *A* against *B*?" often is a short-hand way of getting at several of the criteria of the all-things considered assessment. The conspicuous omission 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.

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 without reading the misdated story reporting United's bankruptcy. 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.

²¹³ Jane Stapleton has done the most to develop this approach in a systematic way. See Jane Stapleton, *Comparative Economic Loss: Lessons from Case-Law-Focused "Middle Theory,"* 50 *UCLA L. Rev.* 531 (2002); Jane Stapleton, *The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable,* 24 *Australian Bar Review* 135 (2003). See also Mark P. Gergen, *The Ambit of Negligence Liability for Pure Economic Loss,* 48 *Ariz. L. Rev.* 749, 763-771 (2006).

If we broaden the frame in which we evaluate the employee's conduct, then it becomes clear 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.²¹⁴ Partly this is for the familiar reason that as society becomes more complex conventional morality—particularly the conventional morality embodied in the common law—has less to say about what is appropriate human behavior and a calculus of the public interest becomes more important. But this is not enough. As Justice Brandeis argues in *INS v. AP*²¹⁵ 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 unique value of the common law 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 morally an actor is obligated to make amends for

²¹⁴ 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. 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. And 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.

²¹⁵ 248 U.S. 215 (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.")

harm his conduct causes.

A controversial Australian case, *Perre v. Apand Proprietary Ltd.*,²¹⁶ illustrates. The case book ends the United Airlines incident. It is a novel claim for pure economic loss that might well be justified under an all-things considered judgment though there is no tincture of invited reliance or of a voluntary undertaking. Apand sold infected seed potatoes to the Sparnons, causing them to lose a crop to bacterial wilt. While the wilt did not spread to neighboring farms a prophylactic health and safety regulation barred the neighbors from selling their potatoes into a lucrative market for five years, causing Perre to lose valuable contracts. Australia's highest court allowed the claim. Many of the judges emphasize the vulnerability of the plaintiff, the strong proof of causation, and the absence of indeterminate liability. 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.

Stevens' theory of tort would preclude liability in the case. Goldberg and Zipursky are unclear about the specific content of the requirement that tort liability ground in violation of a moral duty so it is hard to say what their theory entails in the case. But I think 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 every case in which liability is justified on a mixture of policy grounds and an ex post judgment that it is fair to make the defendant pay for the harm it carelessly caused. If their theory precludes liability on these facts, then it comes at too high a price.

VI. CONCLUSION

We should think of the modern theory of negligence as kin to classical theories of contract. Both are theoretical constructs that came to reshape the law the theorists sought to describe. Why this happens 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 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

²¹⁶ (1999) 198 CLR 180 (High Ct. of Australia).

believes it is wholly untenable. Goldberg and Zipursky would tether negligence by requiring that courts extend the reach of negligence incrementally and 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. 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.